

Abstract
**United Nations Peace Operations:
The Applicable Norms and
The Application of the Law of Armed Conflict
5 June 2000**

Major Joseph P. "Dutch" Bialke, USAF

In this thesis, I first detail the history and applicable norms of United Nations peacekeeping operations, to include the use of force in self-defense as applicable to "classical" peacekeeping operations. I briefly examine the recent Convention on the Safety of United Nations and Associated Personnel. I then illustrate how the "principles and spirit" of the international law of armed conflict have been followed in traditional peacekeeping operations, as well as during robust operations. I explain how, in practice, the international law of armed conflict has been followed in United Nations peace-enforcement operations. Additionally, I argue the importance of keeping clear distinctions between United Nations peacekeeping and peace-enforcement operations.

I then delve into the current uncertainty as to how and when the international laws of armed conflict, the *ius in bello*, apply to United Nations military forces. I illustrate the past practice and position of the United Nations of not applying the law of armed conflict to peacekeeping operations, instead having its forces apply only the "principles and spirit" of the law. I explain why it is important that, in certain circumstances, United Nations military forces follow the law of armed conflict so the forces they oppose will reciprocate. I then discuss the application of the law of armed conflict to United Nations peace-enforcement operations.

I address whether the United Nations are bound by the international law of armed conflict, regardless of whether the United Nations is a signatory to the applicable Conventions. I conclude that the laws of armed conflict apply to peacekeeping forces if and when the forces cross the Geneva Conventions Article 2 threshold. However, I posit that the armed conflict threshold for forces acting under the authority of the United Nations Security Council is somewhat higher than it is for conflicts between nation-states. I discuss the recent promulgation of the Secretary-General's Bulletin regarding the observance of the law of armed conflict by United Nations forces. Finally, I assert the United Nations has the responsibility and duty to make clear the applicability or non-applicability of the international law of armed conflict to its peacekeeping forces and recommend it do so – if it is to be credible and effective in securing and maintaining global peace in the new millennium.

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 8.Aug.00	3. REPORT TYPE AND DATES COVERED THESIS	
4. TITLE AND SUBTITLE UNITED NATIONS PEACE OPERATIONS: THE APPLICABLE NORMS AND THE APPLICATIONS OF THE LAW OF ARMED CONFLICT			5. FUNDING NUMBERS	
6. AUTHOR(S) MAJ BIALKE JOSEPH P				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) UNIVERSITY OF IOWA			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433			10. SPONSORING/MONITORING AGENCY REPORT NUMBER Fy00-260	
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT Unlimited distribution In Accordance With AFI 35-205/AFIT Sup 1			12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words)				
14. SUBJECT TERMS			15. NUMBER OF PAGES 116	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT	

United Nations Peace Operations:
The Applicable Norms and
The Application of the Law of Armed Conflict

By

Major Joseph P. "Dutch" Bialke*
United States Air Force

Submitted in Partial Fulfillment for the Requirements
of the
Legum Magister
Masters of Law Degree

in

International and Comparative Law

from the

University of Iowa College of Law

5 June 2000

4 Credit Thesis

Course 91:657

Table of Contents

I.	Introduction	1
II.	Variations & Norms of United Nations Peace Operations	9
	A. Background and History of United Nations	
	Chapter VI Peacekeeping	9
	1. Classical United Nations Peacekeeping - United Nations Chapter VI - Pacific Settlement of Disputes	11
	2. Chapter VI and ½ - Classical/Traditional Peacekeeping - The Applicable Norms	16
	a. Consent of the Host Nation	23
	b. Impartiality of the United Nations and United Nations Peacekeepers	26
	c. Operational Control and the Chain of Command of United Nations Peacekeepers	28
	d. The Composition of United Nations Classical Peacekeeping Forces	30
	e. Self-Defensive Rules of Engagement and the Use of Force by United Nations Peacekeepers in Classical Peacekeeping Operations	35
	B. United Nations Charter Chapter VI and ¾ Peacekeeping Operations - Robust Operations	41
	C. United Nations Charter Chapter VII Peace-Enforcement Operations	44
	1. The Cold War - The Korean War	48
	2. Post-Cold War - The Persian Gulf War	52
	D. Peacekeeping vs. Peace-Enforcement	55
	E. Protection of Peacekeepers - The Safety Convention	62

III. The Application of the International Laws of Armed Conflict to United Nations Forces - How and When do the Laws of Armed Conflict Apply?	66
A. United Nations Classical Peacekeepers as Noncombatants	66
B. The Laws of Armed Conflict as Applicable to Classical Peacekeeping Operations- The "Principles and Spirit" of the Law	69
C. Equal Application of the Laws of Armed Conflict	77
D. The Law of Armed Conflict as it Applies to Chapter VII Peace-Enforcement Operations	86
E. Can the United Nations be a Signatory to the Geneva Conventions?	89
F. Common Article 2 of the Geneva Convention - The Armed Conflict Threshold	96
G. The United Nations Answer - Half a Solution - A Code of Conduct for Peacekeepers	104
IV. Conclusion	114

I: Introduction

With this new millennium comes a New World. Because of unprecedented advances in travel and communication over the previous century, it is a decisively smaller world. This smaller world emphasizes nation-state differences in ideologies, political economies, and cultures. The world is in constant turmoil and military conflict, yet this turmoil is currently manageable.

The United Nations, with all its flaws, appears to be the foremost global structure capable of ensuring, maintaining, and making world peace in the new millennium. Formed in 1945, the Peoples of the United Nations stated they were determined "to save succeeding generations from the scourge of war", "to unite our strength to maintain international peace and security," and "to ensure . . . that armed force shall not be used, save in the common interest."¹ The hope was that nations, acting in concert

* LL.M. Candidate, University of Iowa College of Law 2000; B.S.C.J.S. 1985, M.A. 1987, J.D. 1991, University of North Dakota. Major Bialke was previously assigned as Deputy Staff Judge Advocate and Chief of International and Operational Law, 319th Air Refueling Wing, Grand Forks AFB, ND, 1997-99; Assistant Legal Advisor, Stabilization Force, Sarajevo, Bosnia-Herzegovina, 1998; Area Defense Counsel, Minot AFB, ND, 1995-97; Chief of Military Justice, 5th Bomb Wing, Minot AFB, ND, 1994-95; Claims Officer, Port-au-Prince, Haiti, 1994; Claims Officer, 42nd Bomb Wing, Loring AFB, ME, 1992-94; Commanding Officer, Bravo Battery, 1-188th Air Defense Artillery Battalion (Light), Grand Forks, ND, 1991-92; Battalion Logistics Officer, 1-188th Air Defense Artillery Battalion (Light), Grand Forks, ND 1988-91; Commander, 835th Medical Detachment, Grand Forks, ND, 1986-88; Assistant

and pursuing a common goal of peace, would produce a stable world. As the Preamble to its Charter attests, the United Nations placed the maintenance of peace among nations as its primary reason for existence.² These words eloquently declare the overriding purpose of the United Nations. However, if the United Nations and its member-states wish to preserve their moral authority to maintain peace, they must not sit idle during times of conflict.³ Rather, the United Nations must be both reactive and proactive in maintaining peace and security.

The United Nations Charter obligates United Nations members to settle their disputes peacefully and to "refrain from the threat or use of force against the territorial integrity or political independence of any state."⁴ Members may not use force against one another, unless exercising the "inherent right of individual or collective self-defense if an armed attack occurs",⁵ or giving assistance to the United Nations when it is taking preventative

Battalion Logistics Officer, 449th Engineer Battalion, Bismarck, ND, 1985-86. This thesis was written in partial fulfillment for the requirements of the LL.M. Masters of Law degree in International & Comparative Law at the University of Iowa College of Law. The opinions and conclusions expressed herein are those of the author and do not necessarily reflect the views of any governmental agency.

¹ U.N. CHARTER, preamble.

² G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297, 297 (1988).

³ Vladimir V. Grachev, *Legal Considerations for Military and Peacekeeping Operations - United Nations Peacekeeping in Transition*, 45 NAVAL L. REV. 273, 281 (1998).

⁴ U.N. CHARTER art. 2 para. 4.

⁵ U.N. CHARTER art. 51.

or enforcement action.⁶ Further, the members of the United Nations are obligated to "accept and carry out the decisions of the Security Council in accordance with the present Charter."⁷

As the world enters the new millennium, conflicts will inevitably occur between nation-states and civil wars will arise. Armed conflict will continue.⁸ However, the opportunity exists to make these conflicts less frequent and destructive. United Nations peacekeeping operations are entering a new era. The United Nations Charter provides the mechanisms, if they are properly applied, to manage conflicts throughout the globe. The United Nations Charter is a living political document, flexible enough to deal adequately with crises as they occur - however, only as long as the member states of the United Nations have the collective political will to continue to participate in peace operations.

⁶ U.N. CHARTER art. 2 para. 5 says:

All Members shall give the United Nations every assistance in any action it takes in accordance with the Charter, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.

⁷ U.N. CHARTER art 25.

⁸ Unfortunately, armed conflict continues. However, the aspiration of every nation-state should be the end to conflict. In Geneva, on August 12, 1999, Secretary General Kofi Annan "signed a solemn appeal calling on all peoples and governments to reject the idea that war is inevitable and to eradicate its underlying causes." *United Nations Calls for Renewed Efforts to Protect Civilians in War*, AFR. NEWS SERV., Aug. 13, 1999.

These peace operations range from the initial United Nations Chapter VI classical peacekeeping operations⁹ to the current trend of "active and robust" Chapter VI¹⁰ and Chapter VII peace-enforcement operations.¹¹ The number, diversity and spectrum of

⁹ Traditionally defined as "blue helmet" operations, in 1992, Secretary-General Boutros Boutros-Ghali defined Peacekeeping as "the deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace." BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE*, 45 (2d ed. 1995). Additionally, "[p]eace keeping has been described as the deployment of a United Nations presence in an area of conflict with the consent of the States, or where relevant, other entities concerned, and as an interim arrangement to contain fighting, prevent the resumption of hostilities and restore international peace and security. The functions of peace keeping, which have traditionally ranged from observance of cease-fire, demarcation lines, or withdrawal of forces agreements, have in recent years widened to include monitoring of election process, delivery of humanitarian supplies, assisting in the national reconciliation process and rebuilding of a States social, economic and administrative infrastructure. Peace-keeping forces have no military mandate of enforcement powers, and although equipped with light defensive weapons, they may use them only in self-defence." Daphna Shrager & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 39, 40 (Umesh Palwankar ed., 1994); "[P]eacekeeping describes the inherently peace action of an internationally directed force of military, police and sometimes civilian personnel to assist with the implementation of agreements between governments or parties which have been engaged in conflict. It presumes cooperation, and the use of military force (other than in self-defense) is incompatible with the concept." J.C. Waddell, *Legal Aspects of UN Peacekeeping*, in *THE FORCE OF LAW: INTERNATIONAL LAW AND THE LAND COMMANDER* 47, 47 (Hugh Smith ed. 1994).

¹⁰ In the early and mid-90's, in Somalia and Bosnia-Herzegovina, classical peace-keeping principles and norms developed during the Cold War were "strained to the breaking point." "[T]he Security Council proclaimed 'no-fly zones' and 'safe areas,' declared punitive actions against warlords, and acquiesced in NATO-declared 'exclusion zones'; ... Member States established command arrangements that did not in all cases terminate in New York;... peace-keepers mounted anti-sniping patrols and called in air strikes." Shashi Tharoor, *The Changing Face of Peace-keeping and Peace-Enforcement*, 35 *FORDHAM INT'L L.J.* 408, 414 (1995).

¹¹ Peace-enforcement operations generally refer to nonconsensual operations conducted by United Nations military personnel or United Nations Member States forces. Secretary-General Boutros Boutros-Ghali succinctly defined such operations as "peace-keeping activities which do not necessarily involve the consent of the parties concerned. Peace enforcement is foreseen in Chapter VII of the Charter." BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE*, 12 (2d ed. 1995). Put another way, "[p]eace enforcement is a Chapter VII mandated

current peace operations present cogent issues regarding the application of the international law of armed conflict.¹²

The international laws of armed conflict do not apply to United Nations classical "blue helmet" peacekeepers as they are not in combat with anyone.¹³ United Nations peacekeepers are noncombatants - that is to say they are not engaging in military

operation carried out by United Nations forces or by States, groups of States or regional arrangements on the basis of an invitation of the State concerned (Korea 1950), or an authorization by the Security Council (Gulf, 1990). They have a clear combat mission and are empowered to use coercive measures to carry out their mandate." Daphna Shrager & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 39, 40 (Umesh Palwankar ed., 1994); "'Peace enforcement' . . . may be defined as a military operation in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and who may be engaged in combat activities." J.C. Waddell, *Legal Aspects of UN Peacekeeping*, in THE FORCE OF LAW: INTERNATIONAL LAW AND THE LAND COMMANDER 47, 47-48 (Hugh Smith ed. 1994).

¹² U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31 defines the international law of armed conflict as "a part of the international law primarily governing relationships between states. The term refers to principles and rules regulating the conduct of armed hostilities between states. Traditionally known as the law of war, the term 'law of armed conflict' is preferred. Since World War II, states have avoided formal declarations of war. Recent multi-lateral conventions, notably the the 1949 Geneva Conventions, refer to armed conflict rather than war. International law regulating armed conflict applies if there is in fact an international armed conflict. It may also apply to armed conflicts that traditionally have not been viewed as 'international' but which clearly involve the peace and security of the international community." *Id.* at para 1-2 (d)(1)(1976); See also, Julianne Peck, Note, *The U.N. and the Laws of War: How can the World's Peacekeepers be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 295 (1995): "The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the victims of armed conflict. In 1977, two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protections to victims of non-international armed conflicts, were opened for signature, but were not as universally accepted." *Id.*

offensive operations. Blue helmet peacekeepers are authorized to use force only in self-defense. Conversely, it is well settled that the laws of armed conflict do apply when forces authorized by the United Nations are "engaged in hostilities as a belligerent", such as in the Korean or the Gulf Conflicts.¹⁴ In such cases, the United Nations forces are "treated in exactly the same way as the armed forces of a state."¹⁵ However, how the international laws of armed conflict apply to post-cold war United Nations peacekeeping operations when these operations become more active and robust, approaching combat, is not clear. Such robust operations include, for example, Somalia and Bosnia-Herzegovina, as well as the continuing mission to enforce the no-fly zone in Iraq.¹⁶ The central issue is how and whether the

¹³ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 150 (Shirley V. Scott & Anthony Bergin eds. 1997).

¹⁴ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 188 (1995).

¹⁵ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 189 (1995).

¹⁶ See generally, Roberto Suro, *U.S. Air Raids on Iraq Become an Almost Daily Ritual; As Fighters Retaliate for Threats, Mission Faces Allies' Questions*, WASH. POST, Aug. 30, 1999, at A3. After Iraq continued to fire anti-aircraft weapons against United Nations authorized aircraft enforcing the no-fly zone, it became clear that the previous policy of simply returning fire in self-defense against only the offending radar and surface-to-air missile sites was not effective. In order to deter future attacks against coalition aircraft, the definition of aircraft self-defense was expanded authorizing follow-on attacks against secondary targets that had not previously engaged the aircraft. Pilots carried previously approved lists containing targets that could be engaged whenever Iraq threatened their aircraft. Additionally, the targets did not have to be engaged immediately, rather the retaliation could occur a day or two later. Such secondary targets included "a military installation 28 miles away" and "a military depot deep in the desert." *Id.* Whether or how the laws of armed conflict apply in such circumstances is not clear. What is clear, however, is that the expanded definition of self-defense and its resulting implementation worked. Iraq stopped engaging aircraft that were enforcing the no-fly zone.

laws of armed conflict apply in United Nations peacekeeping operations that arguably cross the threshold into armed conflict.

In this thesis, I first detail the history and applicable norms of United Nations peace-keeping and peace-enforcement operations, to include the use of force in self-defense as applicable to "classical" peace-keeping operations. I briefly examine the recent Convention on the Safety of United Nations and Associated Personnel. I then illustrate how the "principles and spirit" of the international law of armed conflict have been followed in traditional peacekeeping operations, as well as during robust peacekeeping operations. I explain how, in practice, the international law of armed conflict has been followed in United Nations peace-enforcement operations. Additionally, I argue the importance of keeping clear distinctions between United Nations peacekeeping and peace-enforcement operations.

I then delve into the current uncertainty as to how and when the international laws of armed conflict, the *ius in bello*¹⁷ apply to

¹⁷ The *ius in bello* means the law of armed conflict, international humanitarian law, or what was initially called the law of war. Judith G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J. INT'L L. 285, 287 n. 5 (1996). The *ius ad bellum* are the laws regarding the permissibility of employing the use of force in international law. Judith

United Nations military forces. I illustrate the past practice and position of the United Nations of not applying the law of armed conflict to peacekeeping operations, instead having its forces apply only the "principles and spirit" of the law. I explain why it is important that, in certain circumstances, United Nations military forces follow the law of armed conflict so that the forces they oppose will reciprocate. I then discuss the application of the law of armed conflict to United Nations peace-enforcement operations.

I address whether the United Nations are bound by the international law of armed conflict, regardless of whether the United Nations is a signatory to the applicable Conventions. I conclude that the laws of armed conflict apply to peacekeeping forces if and when the forces cross the Geneva Conventions Common Article 2 threshold. However, I posit that the armed conflict threshold for forces acting under the authority of the United Nations Security Council is somewhat higher than it is for conflicts between nation-states. I discuss the recent promulgation of the Secretary-General's Bulletin regarding the observance of the law of armed conflict by United Nations forces. Finally, I assert that the United Nations has the responsibility and duty to make clear the applicability or non-

G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J.

applicability of the international law of armed conflict to its peacekeeping forces and recommend it do so - if it is to be credible and effective in securing and maintaining global peace in the new millennium.

II: Variations and Norms of United Nations Peace Operations

II. A. Background and History of United Nations Chapter VI Peacekeeping

In 1945, the Security Council was conferred the "primary responsibility for the maintenance of peace and security."¹⁸ The five permanent members of the Council¹⁹ were each given veto power,²⁰ pragmatically reflecting that, in order to maintain peace, there must be a consensus among superpowers. The post-World War II United Nations Charter drafters presumed the victors of the recent war, acting perhaps out of enlightened self-interest, would continue to cooperate with each other, in light of their recent successful joint effort. Instead, the

INT'L L. 285, 287 n. 5 (1996).

¹⁸ U.N. CHARTER art 24, para 1.

¹⁹ The five permanent members are the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. U.N. CHARTER art. 23, para. 1.

²⁰ U.N. CHARTER art 27, para 3.

opposite occurred. The World immediately became bi-polar with conflicting Western democratic and Eastern communistic political ideologies undermining the recently instated United Nations security mechanism.²¹ This was the start of the "Cold War."

During the Cold War, instead of greater cooperation between world powers, the powers continued to grow apart.²² The East-West rivalry rendered the security enforcement mechanism envisaged by the UN Charter utterly ineffectual. The veto power of the Security Council's permanent members frustrated any attempt to exercise its Chapter VII security and peace-enforcement responsibility. Initiative after initiative failed as one or more of the permanent members decisively vetoed them. Yet, conflicts continued throughout the globe - some related to the end of the era of European colonialism and some growing out of local conflicts. Both types of conflicts were frequently affected and aggravated by the ongoing Cold War between the great world powers.²³

²¹ Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 73 (1996); See also, G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297, 297 (1988).

²² Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain"*, 7 DUKE J. COMP. & INT'L L. 35, 44 (1996).

²³ Edward J. Perkins, *United Nations Peace-Keeping*, 18 YALE J. INT'L L. 435, 435 (1993).

Indeed, the veto authority became a real impediment to peace. During the Cold War from 1945-1990, Security Council permanent members vetoed 279 resolutions; this effectively prevented the United Nations from taking constructive and determined action in over one hundred armed conflicts resulting in approximately twenty million deaths.²⁴ To do something to facilitate the "adjustment or settlement of international disputes or situations which might lead to the breach of the peace",²⁵ the United Nations generated a compromise - peacekeeping.²⁶

II A 1: Classical United Nations Peacekeeping - United Nations Chapter VI - Pacific Settlement of Disputes²⁷

The United Nations Charter does not explicitly mention, nor authorize, peacekeeping. In actuality, the United Nations invented the concept. Peacekeeping operations, ultimately, loosely developed out of the United Nations Charter Chapter VI, entitled "Pacific Settlement of Disputes." Chapter VI directs that the Security Council may investigate situations that may

²⁴ *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General*, para 14, U.N. Doc. A/47/277/S/2411(1992).

²⁵ U.N. CHARTER art. 1, para. 1.

²⁶ Edward J. Perkins, *United Nations Peace-Keeping*, 18 YALE J. INT'L L. 435, 435 (1993).

lead to potential conflict. Then, the Security Council, with the consent of the parties, may make recommendations to resolve the conflict.²⁸ Yet, peacekeeping is not specifically contained within United Nations Charter Chapter VI, Pacific Settlement of Disputes. Rather it is inferred from United Nations Charter Article 33.²⁹ A peacekeeping mission, therefore, is a "peaceful means" chosen and consented to by the parties to pursue a peaceful settlement of a conflict.³⁰

The Charter originally did not anticipate the deployment of military forces, under United Nations authority, interposing themselves between parties to an armed conflict. However, the Charter is a flexible political document containing many possibilities and interpretations, depending upon the international situation. The invention of peacekeeping is the pragmatic realization of one of these possibilities.³¹ In the words of a former United Nations Under-Secretary-General for Political Affairs: "[t]he technique of peace-keeping is a

²⁷ U.N. CHARTER arts. 33-38.

²⁸ W. Michael Reisman, *Peacemaking*, 18 YALE J. INT'L L. 415, 416 n. 9 (1993).

²⁹ U.N. CHARTER art 33, para 1 says:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

³⁰ J.M. Sanderson, *Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention*, in PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY 145, 148 (Olara A. Otunno et al. eds., 1998).

distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947."³²

Although not specifically mentioned in the United Nations Charter, peacekeeping can also be implied from the primary purpose of the United Nations. Article 1 of the Charter, as stated earlier, denotes that the primary purpose of the United Nations is to maintain international peace and security. It follows that the United Nations should be empowered with the means to fulfill its purpose.³³ The powers of the United Nations can not be ascertained by strictly construing the Charter. To do so would severely constrain the United Nations and could prevent it from ever acting. The United Nations must have implied powers to allow it to act and achieve its chartered mandate. Through its implied powers, the United Nations has legally created peace observer and peacekeeping units as an

³¹ Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 74 (1996).

³² Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping*, in *NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY* 59, 62 (Alan K. Henrikson ed., 1986).

³³ See *Reparations Case - Advisory Opinion*, 1949 I.C.J. 174 ("[T]he Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties.") *Id.* at 182.

approved method of fulfilling its primary purpose.³⁴ Although peacekeeping operations are not specifically mentioned in the United Nations Charter, the International Court of Justice established that the Charter was sufficiently broad enough to allow the Security Council to monitor a conflict without having to resort to a Chapter VII peace-enforcement action.³⁵

Essentially, peacekeeping operations are a "stop-gap" measure that suspends a conflict in order to allow the peace process to occur.³⁶ In 1948, the United Nations mounted its first peacekeeping operation under Chapter VI. The United Nations sent the United Nations Truce Supervision Organization (UNTSO) to the Middle East to monitor the truce in the 1948 Arab-Israeli War. The unarmed observers of UNTSO continue their mission in the Middle East today. They work alongside the two armed Middle East peacekeeper organizations: the United Nations Disengagement Observer Force (UNDOF) in the Golan Heights and the United Nations Interim Force in Lebanon (UNIFIL).³⁷

³⁴ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 12 (1985).

³⁵ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 164-67 (Jul. 20); the I.C.J. agreed that the United Nations Charter authorized peacekeeping operations, to include peacekeeping operations authorized by the General Assembly. The I.C.J. cautioned, however, that "the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so." *Id.* at 163.

³⁶ W. Michael Reisman, *Peacemaking*, 18 YALE J. INT'L L. 415, 415 (1993).

However, a peacekeeping mission must be constructed according to the nature of the conflict, the parties involved, and the stability or fragility of the negotiated stay of the hostilities. Peacekeeping missions are as diverse as are conflicts. For example, the United Nations Truce Supervision Organization in Palestine (UNTSO) was deployed to monitor a cease-fire. The United Nations Force in Cyprus (UNFICYP) and the United Nations Interim Force in Lebanon (UNIFIL) placed themselves between the parties to the conflicts preventing one side from crossing into the territory of the other. The Middle East United Nations Emergency Force II (UNEF II) also occupied a "buffer zone", assisting the parties to the conflict to disengage and withdraw their forces. The Golan Heights United Nations Disengagement Observer Force (UNDOF) mandate included inspecting and verifying that the sides were complying with their accepted force sizes and weapons limits. To further exemplify the diversity of peacekeeping operations, peacekeepers may sometimes act as on-the-spot mediators, directly participating in negotiations between the parties. Both the Operations des Nations Unies au Congo (ONUC) and the UNFICYP directly assisted the parties to resolve their numerous ongoing controversies.³⁸

³⁷ THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 17 (3d ed. 1996).

³⁸ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 15-16 (1985).

II A2: Chapter VI and ½ - Classical/Traditional

Peacekeeping - The Applicable Norms

Classical, or what is also referred to as traditional, peacekeeping necessarily grew out of East-West Cold War antagonism - to "fill the void created by the Cold War."³⁹ Something needed to be done to help resolve regional conflicts, but permanent members of the Security Council on one side of the bi-polar Cold War world simply vetoed resolutions that appeared beneficial to the other side and vice-versa. The United Nations created an end-run around this persistent use of the Security Council veto, now known as "classical peacekeeping operations." As a result, the United Nations was able to do something to bring about the "adjustment or settlement of international disputes or situations which may lead to the breach of the peace."⁴⁰

However, peacekeeping is more than just investigating and making recommendations to the parties on how to resolve the conflict as envisioned within the context of United Nations Charter Chapter VI. Yet, neither does Chapter VII, Action with Respect to

³⁹ Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 U. DET. MERCY L. REV. 499, 502 (1996).

Threats to the Peace, Breaches of the Peace, and Acts of Aggression, anywhere encompass peacekeeping. As a result, Secretary-General Dag Hammarskjöld quaintly, but poignantly, expressed that classical peacekeeping is authorized by "United Nations Chapter VI and ½."⁴¹ This characterization by the former Secretary-General deftly acknowledged that classical peacekeeping is truly a creative invention. Yet, the Secretary-General's jocose description also anticipated the great difficulty in determining precisely where classical peacekeeping appears on the international diplomacy continuums of "consent and coercion" and "passivity and force."⁴²

Ultimately, Chapter VI and 1/2 peacekeeping is much more restrained than a Chapter VII peace-enforcement action. Classical peacekeeping is a sort of hybrid action of the United Nations - more vigorous than what Chapter VI authorizes, but much less robust than a Chapter VII peace-enforcement action. The classical peacekeeping mission is but one of many peace maintenance instruments available. The United Nations may resort to any of several types of peace operations that exist along a spectrum denoting different levels of both force and

⁴⁰ U.N. CHARTER art 1, para 1.

⁴¹ See Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing and Agenda for Peace*, WASH. Q. 51, 52 (Winter 1993).

⁴² Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 U. DET. MERCY L. REV. 499, 502 (1996).

host-nation consent. Nevertheless, understandably, "[m]ost U.N. operations are taken with full local consent."⁴³

Peacekeeping is the use of military forces to secure and maintain peace, rather than using them to engage in war. Military personnel were frequently used in the Cold War as peacekeepers out of the necessity to limit and resolve conflicts without formally, but futilely, presenting a proposal to the United Nations Security Council to face an almost certain permanent member veto. The role of a United Nations peacekeeper is in many ways symbolic, an instrument that shows international resolve for restoring and enforcing peace. Peacekeepers, although usually armed, are to "remain above the battle and only to use their weapons in the last resort for self defence."⁴⁴

Peacekeepers are not combat forces - they merely monitor previously agreed upon cease-fires and truces. This is not say that traditional peacekeepers never use force, but it is the exception and not the rule.⁴⁵ In practice, United Nations field

⁴³ WILLIAM J. DURCH, *THE EVOLUTION OF U.N. PEACEKEEPING* 5 (1993).

⁴⁴ Brian Urquhart, *The Future of Peace-Keeping*, 36 NETH. J. INT'L L. 50, 52 (1989).

⁴⁵ From 1960-64, the United Nations authorized a peacekeeping force to restore law and order to the Congo. The United Nations Operation in the Congo (Operations des Nations Unies au Congo - ONUC) redefined and expanded the use of force in self defense to prevent local factions from preventing the peacekeepers from carrying out their mandate and responsibilities. "The concept of self defense, as well as the principles of nonintervention and sovereignty, were loosely defined and greatly modified in the Congo

commanders have rarely used force, except in self-defense. To operate otherwise would run counter to the need for continued consent of the parties and impartiality to them.⁴⁶ In the words of one author, "[t]he weapons used by a peacekeeper in achieving his objectives are those of negotiation, mediation, quiet diplomacy, tact and the patience of Job - not the self-loading rifle."⁴⁷

The peacekeepers are usually posted between rivaling factions. The peacekeeper's duty is not typical military duty. Rather, the peacekeepers' role is to provide an international presence, one that hopefully discourages the parties to the conflict from resuming hostilities.⁴⁸ The real value of peacekeeping is its expression of international resolve. The peacekeepers wear blue helmets, display the United Nations' blue flag - and above all else seek to remain impartial and neutral to the conflict. Generally, the object of peacekeeping is not to resolve the conflict, but rather to encourage a passive environment that allows the parties to constructively negotiate.⁴⁹ In short,

Operation." Jon E. Fink, *From Peacekeeping to Peace-Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD J. INT'L. L. & TRADE 1, 15 (1995).

⁴⁶ Katheine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 255-56 (1999).

⁴⁷ INDAR JIT RIKHYE, *PEACEKEEPING: APPRAISALS & PROPOSALS* 6 (1983).

⁴⁸ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 324 (1993).

⁴⁹ Michael Stopford, *Peace-Keeping or Peace-Enforcement: Stark Choices for Grey Areas*, 73 U. DET. MERCY L. REV. 499, 502 (1996).

"peace-keeping is not a soldier's job, but only a soldier can do it."⁵⁰

As a result of its innovation of peacekeeping, the United Nations gained relevance in dealing with the armed conflicts throughout the globe. From the 1950's onward, the United Nations began to involve itself, albeit superficially, in mitigating and containing small regional conflicts.⁵¹ With the consent of the belligerent parties to a local conflict, the United Nations intervened with lightly armed military forces.⁵² Not surprisingly, even though the Security Council members had the "primary responsibility" for the maintenance of peace and security,⁵³ armed forces of its permanent members rarely, if ever, participated in the peacekeeping operations.⁵⁴ The permanent members of the Security Council reached a "basic understanding" that their military presence in such an operation could easily be counter-productive and possibly escalate a

⁵⁰ C.C. MOSKOS JR., *PEACE SOLDIERS: THE SOCIOLOGY OF A UNITED NATIONS MILITARY FORCE*, 139 (1976).

⁵¹ Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 73 (1996).

⁵² Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 73-74 (1996).

⁵³ See U.N. CHARTER art. 24, para. 1.

⁵⁴ Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 73 n. 11 (1996); The Soviet Union usually was extremely skeptical of United Nations peacekeeping operations, even actively opposing specific missions. Then, in 1987, the Soviet Union conceded the value of such operations. As a result, there was finally unanimity among the major powers that the United Nations had international authority to conduct peacekeeping operations. Brian Urquhart, *The Future of Peace-Keeping*, 36 NETH. J. INT'L L. 50, 52 (1989).

conflict rather than diffuse it. Therefore, the permanent members informally agreed that they should rarely, if ever, contribute forces to classical peacekeeping operations.⁵⁵

As a result of the Security Council permanent members' political pragmatism, in not operationally participating in these largely symbolic United Nation peacekeeping missions, peacekeeping forces consisted of military personnel called from small neutral countries, such as Austria, Fiji, Canada, and the countries of Scandinavia. This arrangement was first realized in 1956, during the Suez Canal Crisis, when Israel, France, and Great Britain invaded and occupied Egyptian territory. This military invasion by Israel and two permanent Security Council members could have easily provoked the Soviet Union - another permanent Security Council member - to enter the conflict on behalf of Egypt. This would not have been desirable.⁵⁶

To solve this dilemma, when Secretary-General Dag Hammarskjold created the United Nations Emergency Force (UNEF I) in response, he expressly denied the participation of all permanent members of the Security Council. The UNEF I, composed of small-state forces, deployed to the Egypt-Israeli border. The UNEF I acted

⁵⁵ Richard Connaughton, *Military Intervention and UN Peacekeeping*, in *To LOOSE THE BANDS OF WICKEDNESS* 171 (Nigel Rodley, ed., 1992).

as a buffer while the French and British forces withdrew. This astute political solution acted as precedent in future United Nations peacekeeping operations. It facilitated the acquiring of consent from the parties involved in conflicts, ensured that the United Nations remained impartial, and, ultimately, prevented the potential escalation of conflicts by eschewing direct super-power involvement.⁵⁷

UNEF set numerous precedents for future United Nations peacekeeping operations. It made clear that the consent of the host-nation was an absolute prerequisite to the deployment of any United Nations peacekeeping force. Deployed peacekeeping forces would be impartial neutral observers and operate under the command and control of the United Nations. The forces would be multi-national, but permanent members of the Security Council would not contribute to them. Finally, the United Nations peacekeeping forces would operate under defensive rules of engagement.⁵⁸ These limitations became the norms for classical United Nations peacekeeping operations.

⁵⁶ Lori F. Damrosch, *The Role of the Great Powers in United Nations Peacekeeping*, 18 YALE J. INT'L L. 429, 429 (1993).

⁵⁷ Lori F. Damrosch, *The Role of the Great Powers in United Nations Peacekeeping*, 18 YALE J. INT'L L. 429, 429 (1993).

⁵⁸ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 561 (1994). In summary, "[A] consistent body of [classical peacekeeping] practice and doctrine evolved over the years: peace-keepers functioned under the command and control of the Secretary-General; they represented moral authority rather than the force of arms; they reflected the universality of

II A2(a): Consent of the Host Nation

Without the consent of the host-nation, the United Nations is without authority to deploy armed forces on otherwise sovereign territory. The United Nations Charter says that "[t]he organization is based upon the principle of the sovereign equality of all members"⁵⁹ and "the United Nations shall [not] intervene in matters which are essentially within the domestic jurisdiction of any state."⁶⁰ Absent a Chapter VII peace-enforcement resolution, the Security Council may only make recommendations to a member-state under United Nations Charter Chapter VI. Chapter VI does not contain any express provision that allows the Security Council to create a multi-national armed force composed of military members from United Nations member-states and unilaterally deploy that force to another sovereign nation-state. If the United Nations were to do so, it would be intervening in a sovereign state's domestic jurisdiction. However, if a nation consents to the deployment

the United Nations in their composition; they were deployed with the consent of the parties; they were impartial and functioned without prejudice to the rights and aspirations of any side; they did not use force or the threat of force except in self-defense; they took few risks and suffered a minimal number of casualties; and they did not seek to impose their will on the parties." Shashi Tharoor, *The Changing Face of Peace-keeping and Peace-Enforcement*, 35 *FORDHAM INT'L L.J.* 408, 414 (1995).

⁵⁹ U.N. CHARTER art. 2 para. 1.

⁶⁰ U.N. CHARTER art. 2 para. 7.

of United Nations peacekeeping forces on its soil, there is no violation of national sovereignty.⁶¹

The notion of consent from the host nation remains the keystone of classical peacekeeping. Regardless of the consequences, if a nation or party to the conflict withdraws its consent, United Nations peacekeepers must withdraw. In 1967, for example, the United Arab Republic (Egypt) withdrew the consent it previously granted that allowed the stationing of the United Nations Emergency Force I (UNEF I). Egypt called for the complete withdrawal of United Nations forces from its territory. The United Nations General-Secretary Dag Hammarskjold, fully understanding that United Nations forces could legally remain in Egypt only as long as its government allowed them to, ordered all United Nations forces to withdraw. They did so. Unfortunately, almost immediately after the United Nations forces evacuated Egypt, the 1967 Middle East War began.⁶²

⁶¹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 561-62 (1994).

⁶² Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 15 (1985). Secretary-General Dag Hammarskjold said the United Nations "could not request the Force to be stationed or operate on the territory of a given country without the consent of the Government of that country." *Report of the Secretary General*, UN Doc. A/3302 (1956). After Egypt withdrew its consent, the United Nations Security Council could have changed the Chapter VI peacekeeping force into a Chapter VII coercive force. The Security Council did not seriously entertain this alternative. Yoel Arnon Tsur, *The United Nations Peace-Keeping Operations in the Middle East From 1965 to 1976*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 183, 207-08 (A. Cassese ed., 1995).

After a country withdraws its consent, peacekeeper force protection immediately becomes much more problematic. The country withdrawing consent might no longer recognize the United Nations personnel as having privileges and immunities while in the territory. Additionally, countries, which have contributed forces to the peacekeeping force, may begin to immediately unilaterally withdraw their troops ahead of the rest of the United Nations force. All these factors work toward the United Nations evacuating United Nations personnel as soon as possible following consent withdrawal.⁶³

The United Nations and the host-nation usually formalize the host-nation consent with a Status of Forces Agreement (SOFA). One primary provision of any such SOFA is that United Nations personnel have absolute jurisdictional immunity from the host-nation regarding criminal matters. Jurisdictional immunity of peacekeepers has long been a prerequisite before United Nations member-states will contribute soldiers to a peacekeeping force. As such, it has, through practice, become customary international law.⁶⁴

⁶³ Antonietta Di Blase, *The Role of the Host-Nation's Consent with Regard to Non-Coercive Actions by the United Nations*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 55, 78 (A. Cassese ed., 1995).

⁶⁴ R.C.R. Siekmann, *The Codification of General Principles for United Nations Peace-Keeping Operations*, 35 NETH. INT'L L. REV. 328, 331 (1988).

II A2(b) Impartiality of the United Nations and United Nations Peacekeepers

In a classical United Nations peacekeeping operation, the United Nations and United Nations peacekeeping military forces, must remain impartial. The United Nations Charter treats all member-states of the United Nations as equal sovereigns.⁶⁵ In order to mediate a conflict effectively, the United Nations must maintain its status as a neutral and objective third party.⁶⁶ United Nations neutrality distinguishes peacekeeping from peace-enforcement. In peace-enforcement, the Security Council determines an aggressor-state and then may side with the state that the aggressor-state attacked.⁶⁷

⁶⁵ U.N. CHARTER art. 2 para. 1.

⁶⁶ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 561-66 (1994). In the words of one United Nations official, "Impartiality is the oxygen of peace-keeping: the only way peace-keepers can work is by being trusted by both sides, being clear and transparent in their dealings, and by keeping lines of communication open. The moment they lose this trust, the moment they are seen by one side as the 'enemy,' they become part of the problem they were sent to solve." Shashi Tharoor, *The Changing Face of Peace-keeping and Peace-Enforcement*, 35 FORDHAM INT'L L.J. 408, 417-18 (1995).

⁶⁷ U.N. CHARTER art. 39 says:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 [measures not involving force] and 42 [demonstrations, blockade, and other operations by air, sea, or land forces], to maintain or restore international peace and security.

In classical peacekeeping, however, the United Nations must treat parties to a conflict equally and not support one over the other. Equal treatment is the norm unless, of course, one party is in clear violation of international law. United Nations impartiality applies equally in international and civil conflicts. If the United Nations were to support a rebel movement over a nation-state government, this support would imply that the United Nations does not believe the government is equal to other nation-state governments. Conversely, if the United Nations supported a nation-state government over a rebel organization and the organization subsequently came into power, the United Nations and individual nation-states might be reluctant to then recognize the new government. Most importantly, however, impartiality in United Nations peacekeeping is essential in order to ensure the safety of peacekeepers and obtain the consent, trust, and continued cooperation of the parties to the conflict.⁶⁸

⁶⁸ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 574-77 (1994). Classical peacekeeping's "fundamental principles are those of objectivity and nonalignment with the parties to the dispute, ideally to the extent of total detachment from the controversial issues at stake." INDAR JIT RIKHYE ET AL., *THE THIN BLUE LINE* 11 (1974).

II A2(c): Operational Control and the Chain of Command of United Nations Peacekeepers

Direction and control of peacekeeping units is the responsibility of the United Nations. However, direction and control of individual peacekeepers is often the responsibility of the individual soldier's country. United Nations peacekeeping forces follow the operational orders of the United Nations. The authority of the Security Council flows to the United Nations Secretary-General. The Secretary-General then appoints the Task Force Commander. The Task Force Commander reports directly to, and takes orders from, the Secretary-General. In this way, the United Nations maintains operational control over a peacekeeping unit. Yet, the individual contributing nations still wield significant political influence as they may withdraw their individual forces at any time. However, the United Nations, as a matter of practice, alleviates the problem of one country prematurely withdrawing its forces from an operation by making the total force politically and geographically diverse. Therefore, if one country withdraws its

individual forces, the entire peacekeeping force does not become operationally compromised.⁶⁹

In summary, a United Nations peacekeeping force is, by its very nature, multi-national. An individual soldier in this multi-national force is subject to both the United Nations and the soldier's respective national chain of command. The soldier's country trains, arms, and equips the soldier. Further, soldiers may be disciplined only by their respective national contingents. Yet, the United Nations exercises operational control over, feeds, and houses the soldier. This dual command arrangement, with its inherent divided loyalties, is oftentimes problematic. Both the United Nations and the contributing nation exercise some control over the soldier, but neither has complete control.⁷⁰

⁶⁹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 574-77 (1994).

⁷⁰ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 574-77 (1994). Most countries are reluctant to release complete control of the forces they provide to United Nations peacekeeping operations. The United States, for example, when providing forces to the United Nations, prohibits its personnel from taking an oath of loyalty to the United Nations. 22 USC 2387 says:

Whenever the President determines it to be in furtherance of the purposes of this chapter, the head of any agency of the United States Government is authorized to detail or assign any officer or employee of his agency to any office or position with any foreign government or foreign government agency, where acceptance of such office or position does not involve the taking of an oath of allegiance to another government or the acceptance of

II A2(d) : The Composition of United Nations Classical Peacekeeping Forces

Peacekeepers within a United Nations force generally speak different languages and have different cultures, political ideologies, and religion. Although these differences obviously make peacekeeping operations more difficult, this extensive diversity in peacekeeping units gives legitimacy to the mission and, hence, fosters better cooperation from the parties of the conflict. Further, a multi-national peacekeeping unit tends to be more compliant to the will of the United Nations Secretary-General, than if the peacekeeping organization were composed of military personal from only a single nation-state. If the members of a peacekeeping force came from a single nation-state, that single nation-state could potentially wield considerably more influence in the peacekeeping operation than either the United Nations or the Secretary-General.⁷¹

As mentioned earlier, the United Nations generally excluded permanent Security Council members from participation in peacekeeping operations. The Secretary-General, possibly at the

compensation or other benefits from any foreign country by such officer or employee.

implicit behest of the permanent members, excluded them from peacekeeping duties to prevent peacekeeping operations from being embroiled in Cold War politics. Nevertheless, permanent members did participate in a few peacekeeping operations. For example, Great Britain contributed to the peacekeeping force in Cyprus and the United States contributed to the peacekeeping force in Egypt following the Egyptian-Israeli peace-treaty. These two operations were the exceptions and not the rule. During the Cold War, the permanent members of the Security Council generally did not participate in United Nations peacekeeping operations.⁷²

United Nations peacekeeping missions during the Cold War usually took place in generally safe operational environments. The missions were often very successful. For example, the United Nations Disengagement Observer Force (UNDOF), deployed as observers to Syria in 1974 after the Yom Kippur War, masterfully facilitated the peaceful disengagement and withdrawal of armed forces, of both sides of the conflict, from the disputed area.⁷³ After the successful withdrawal of forces, Egypt's President

⁷¹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 577-78 (1994).

⁷² Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 578-79 (1994).

⁷³ Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict after the Cold War*, 7 DUKE J. COMP. & INT'L L. 71, 74 (1996).

Nasser simply requested the UNDOF dissolve and it did.⁷⁴

Peacekeeping is, at present, internationally accepted as an appropriate vehicle for managing conflicts by acting as a buffer and giving parties to the conflict the ability to look for a long-term peaceful solution.⁷⁵

After the Cold War, the United Nations increased peacekeeping operations, both in number and mission complexity. From 1948 to 1988, 40 years, the United Nations authorized only 13 peacekeeping missions. From 1988 to 1998, 10 years, the United Nations authorized 36 missions, over a 1000% increase. Such operations also included robust peacekeeping actions in Somalia, Haiti, and the Balkans.⁷⁶ However, classical peacekeeping missions, the type of peace operations that occurred during and immediately after the Cold War, are becoming less frequent. Classical peacekeeping operations are being replaced by United

⁷⁴ Marianne von Grunigen, *Neutrality and Peace-Keeping*, in UNITED NATIONS PEACE-KEEPING: LEGAL ESSAYS 125, 134 (A. Cassese ed., 1995).

⁷⁵ Unfortunately, parties to a conflict may sometimes illegitimately use the buffer created by the United Nations peacekeeping force as simply cover to avoid constructive negotiating toward a settlement. For this reason, United Nations peacekeeping missions should look to restoring and maintaining peace and, simultaneously, pursue a negotiated settlement to the conflict. Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 17 (1985).

⁷⁶ United Nations, *UN Peacekeeping: Some Questions and Answers*, <<http://www.un.org/depts/dpko/faq.htm>> (last modified Sep. 1998); See also, Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47, 47 n. 1 (1994).

Nations authorized action performed by regional military organizations.⁷⁷

To illustrate, in mid-1993, United Nations peacekeepers numbered approximately 80,000 personnel. Four years later, at the end of 1997, the number of blue helmet peacekeepers dropped to 13,000. This reduction is attributable to regional military alliances and organizations such as North Atlantic Treaty Organization (NATO), under the authority of the United Nations, assuming most of the responsibility of peacekeeping. When these United Nations authorized multi-national and regional peacekeeping missions throughout the globe are taken into account, the number of peacekeepers has remained constant.⁷⁸ This change in composition, from United Nations *ad hoc* classical peacekeeping forces to United Nations authorized regional organization peacekeeping forces has resulted in typically more robust, still dangerous, but more effective peacekeeping.⁷⁹

⁷⁷ Vladimir V. Grachev, *Legal Considerations for Military and Peacekeeping Operations - United Nations Peacekeeping in Transition*, 45 NAVAL L. REV. 273, 277 (1998).

⁷⁸ Examples of such missions include Bosnia-Herzegovina under the North Atlantic Treaty Organization (NATO), Liberia and Sierra Leone under the Economic Community of West African States (ECOMOG), multinational forces in Haiti led by the United States, forces in Rwanda led by France, and forces in Albania led by Italy. See Vladimir V. Grachev, *Legal Considerations for Military and Peacekeeping Operations - United Nations Peacekeeping in Transition*, 45 NAVAL L. REV. 273, 276 (1998).

Currently, the United Nations, if it wishes to engage in a peace operation, must rely upon the good will of a limited number of its member-states able to conduct such an operation. Often, such member-states may understandably want to control and demand to know exactly where and how their forces are to be used. Additionally, member-states may agree to participate only if the peacekeeping force is organized under a regional alliance, authorized by the United Nations to perform a peacekeeping operation, but not under the United Nations command structure. As a result, the United Nations may not be able to remain directly involved in many future peace operations. This lack of United Nations direct involvement could lead to it losing legitimacy and credibility. Countries could perceive the United Nations as weak as it "contracts out to regional military alliances" its peacekeeping responsibilities and obligations rather than performing them itself.⁸⁰

⁷⁹ See generally, Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain,"* 7 DUKE J. COMP. INT'L L. 35 (1996).

⁸⁰ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 322 (1995).

II A2(e): Self-Defensive Rules of Engagement and the Use of Force by United Nations Peacekeepers in Classical Peacekeeping Operations

The final customary norm of United Nations classical peacekeeping is restricting the use of force to self-defense. United Nations Charter Article 2(1)⁸¹ recognizes "the sovereign equality of all of its Members" and Article 2(7)⁸² restricts the United Nations from intervening in state domestic matters, except during Chapter VII enforcement actions.⁸³ Although the United Nations Charter does not explicitly address the use of armed force in a classical peacekeeping operation, nor provide any rules or guidelines,⁸⁴ authorized use of force in a classical peacekeeping operation is generally limited to self-defense.

⁸¹ United Nations Charter Article 2(1) says:
The Organization is based on the principle of the sovereign equality of all its Members.

UNITED NATIONS CHARTER art 2, para. 1.

⁸² United Nations Charter Article 2(7) says:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

UNITED NATIONS CHARTER art. 2, para 7.

⁸³ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 570 (1994).

⁸⁴ R.C.R. Siekmann, *The Codification of General Principles for United Nations Peace-Keeping Operations*, 35 NETH. INT'L L. REV. 328, 328 (1988).

Further, the use of force must be proportional to the situation.⁸⁵

Although professional military personnel conduct classical peacekeeping operations, peacekeeping operations generally do not envisage combat as the means to mission accomplishment. In this regard, Chapter VI peacekeeping is clearly distinguished from Chapter VII peace-enforcement combat operations. Classical peacekeeping is founded on consent of the parties to the conflict. Since the parties have consented to the presence of the peacekeepers, the need to resort to force is greatly diminished. As a result, classical peacekeepers are generally only equipped with weapons for use in self-defense.⁸⁶ As stated by William Durch, "[p]eacekeepers may be armed, but only for self-defense; what constitutes appropriate self-defense will vary by mission, but because they are almost by definition outgunned by the disputants they are sent to monitor, any recourse to force must be calibrated to localize and diffuse, rather than escalate, violence."⁸⁷

⁸⁵ Judith G. Gardam, *Proportionality and Force in International Law*, 87 A. J. INT'L L. 391, 391 (1993).

⁸⁶ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 15-16 (1985).

⁸⁷ WILLIAM DURCH, *THE EVOLUTION OF UN PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS* 4 (1993). In 1958, the United Nations General-Secretary Dag Hammarskjöld warned against interpreting "self-defense" too broadly. He said that "a wide interpretation of the right of self-defence might well blur the distinction between [peacekeeping] operations and combat operations, which would require a decision under Chapter VII of the Charter and an explicit,

This restriction of the use of force only in self-defense attempts to ensure that the United Nations peacekeepers remain impartial to the conflict and do not take sides. Peacekeepers can maintain a presence in a country only if the country gives its consent. If a peacekeeping unit took sides in the conflict, it would, in essence, become a hostile force. The actions, and even the mere presence of such a force, could greatly damage relations with the host-country and easily lead the host-country to withdraw its consent. For this reason, it is imperative that a United Nations peacekeeping unit remains impartial and only uses force in self-defense.⁸⁸

A classical Chapter VI $\frac{1}{2}$ peacekeeping force has no authority or mandate for offensive operations. To use force offensively against a party to the conflict would violate the sovereignty of a state and constitute unauthorized intervention in violation of United Nations Charter Articles 2(1) and 2(7) which declare all

more far-reaching delegation to the Secretary-General than would be required for [peacekeeping] operations." *Summary Study of the Experience Derived from the Establishment and Operation of the Force*, UN Doc. A/3943 of 9 October 1958, paras. 178-79.

⁸⁸ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 573 (1994). Sir Brian Urquhart explains: "Experience shows that a peacekeeping force which uses its weapons for purposes other than self-defence quickly becomes part of the conflict and therefore part of the problem. It loses its essential status as being above the conflict and acceptable to all sides." Sir Brian Urquhart, *The Future of Peace-Keeping Operations*, 36 NETH. J. INT'L L. 50, 54 (1989).

member-states are equal sovereigns.⁸⁹ However, United Nations Charter Article 104 grants the United Nations, operating within the borders of its member states, whatever legal rights are "necessary for the exercise of its functions and the fulfillment of its purposes".⁹⁰ In this regard, it is imperative that a peacekeeping unit has the legal right to defend itself if attacked.⁹¹ Just as necessary, one peacekeeping unit must be able to use force when aiding another peacekeeping force being attacked. Peacekeeping forces, of course, may also collectively defend themselves.⁹²

Initially, the use of force in self-defense was generally limited to the most dire of circumstances. Such circumstances included the "imminent danger of death, bodily harm, arrest, or abduction."⁹³ However, these restrictive rules of engagement

⁸⁹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 570 (1994).

⁹⁰ U.N. CHARTER art. 104.

⁹¹ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 570 (1994).

⁹² Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 571 (1994).

⁹³ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 571 (1994). Indeed, the Secretary-General first stated that a peacekeeping unit could not use force on its own initiative. A peacekeeping unit could legitimately use force in self-defense only if the force was taken in direct response to being attacked by a party using deadly force. *Id.* at n. 90, citing *First Report of the Secretary-General*, para. 15, U.N. SCOR, 15th Sess., Supp. For Jul.-Sep. 1960, at 19, U.N. Doc. S/4389 (1960). This extremely restrictive authorization of the use of force in self-defense by a peacekeeping unit would only be viable when all parties to the conflict are

proved unworkable. Out of operational necessity, the United Nations began to broaden considerably the definition of the use of force in self-defense. During the early 60's, the United Nations authorized a 20,000-member force to establish law and order in the Congo. The United Nations peacekeeper rules of engagement initially authorized force only in self-defense. However, as the nature of the operation became more complicated, the United Nations resorted to an expansive definition of "self-defense" - to include even the authorization of pre-emptive strikes against parties to the conflict who were likely to attack the peacekeepers.⁹⁴ In subsequent classical peacekeeping operations, however, this expanded definition of self-defense has rarely been necessary or realistic.

To constitute the legitimate use of force in self-defense in a classical peacekeeping operation, the force must be both necessary and proportional. In other words, there must be a potential or real threat that justifies the use of force and the soldier may not use any greater force than is necessary to deal with the threat. If attacked with deadly force, a peacekeeper may respond with deadly force. After the threat is neutralized,

entirely committed to resolving the conflict and, as a result, fully welcome and cooperate with the peacekeepers. *Id.* at 571.

⁹⁴ D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 202-203 (1964).

the soldier must stop using force.⁹⁵ When a peacekeeper uses proportionate force in self-defense, the peacekeeper does not then lose noncombatant⁹⁶ protection. However, a peacekeeper, if engaged in sustained conflict and no longer acting strictly in self-defense, could lose noncombatant status, become a combatant⁹⁷ and then be lawfully engaged as a target.⁹⁸ As a practical matter, however, peacekeeping operations generally do not involve peacekeeping forces entering into a state of armed conflict with the actual parties to the conflict. Because peacekeepers, in classical "blue helmet" peacekeeping operations, have limited the use of force to self-defense, the

⁹⁵ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 573 (1994).

⁹⁶ The term noncombatant is used to describe individuals who may not be lawfully targeted. Such individuals include civilians, medical personnel, chaplains, & combat personnel who "have been placed out of combat by sickness, wounds, or other causes including confinement as prisoners of war." U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31, para 3-4 (a-d) (1976). The term also includes United Nations peace-keeping forces. See *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Sec. 1.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf> (explaining that the "bulletin does not affect [United Nations peacekeepers'] status as noncombatants, as long as they are entitled to protection given to civilians under the international law of armed conflict.").

⁹⁷ "A combatant is a person who engages in hostile acts in an armed conflict on behalf of a Party to the conflict. A lawful combatant is one authorized by competent authority of a Party to engage directly in armed conflict. He must conform to the standards established under international law for combatants . . . The combatant, thus invested with authority, must be recognizable as such." U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31, para 3-2 (a-d) (1976). Combatants are lawful targets and may be engaged at any time during an armed conflict. U.S. Dept. of the Air Force, *Air Force Pamphlet 110-34*, paras. 2-6 & 2-7 (1980).

⁹⁸ See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 625 n. 12 (1995).

application of the law of armed conflict to such operations has not been an issue.⁹⁹

II B: United Nations Charter Chapter VI and $\frac{3}{4}$

Peacekeeping Operations - Robust Operations

During post-cold war active and robust Chapter VI and $\frac{1}{2}$ peacekeeping operations, sometimes referred to as Chapter VI and $\frac{3}{4}$ peacekeeping operations, the United Nations military forces tend to operate under more vigorous rules of engagement. The definition of self-defense is expanded. For example, in 1992, the United Nations Protection Force (UNPROFOR) was given the mission in Bosnia-Herzegovina to protect convoys and supplies designated for humanitarian purposes. The Secretary-General, while not authorizing the United Nations peacekeepers to engage in offensive operations, again used an expanded definition of "self-defense."¹⁰⁰ The Secretary-General declared that peacekeepers in Bosnia-Herzegovina "would follow normal peacekeeping rules of engagement [and] would thus be authorised to use force in self-defence . . . It is noted that in this context self-defence is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out

⁹⁹ Judith G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J. INT'L L. 285, 291 (1996).

their mandate."¹⁰¹ The Secretary-General also said that United Nations peacekeepers would protect convoys, if requested to do so by the United Nations High Commissioner for Refugees. United Nations peacekeepers would also accompany repatriated prisoners of war to safe areas, if requested to do so by the International Committee of the Red Cross (ICRC).¹⁰²

This expanded, and arguably extremely loose, definition of self-defense is likely to become the applicable norm for United Nations peacekeeping forces in future robust peacekeeping operations. A United Nations force may protect itself in self-defense, and it may prevent another armed force from interfering with it, while it is carrying out a United Nations mandate. However, any response must be proportionate to the attack in that it is directed at subduing the attackers and it makes every reasonable effort to prevent the fight from escalating. Additionally, the use of armed force, taken in response to actions that prevent the accomplishment of the United Nations mandate, must be tied to humanitarian concerns. By limiting coercive use of force to humanitarian circumstances, the

¹⁰⁰ L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 324 (1993).

¹⁰¹ L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 324 (1993).

¹⁰² L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 324 (1993).

peacekeepers can maintain the moral authority necessary to ensure their safety and continue their mission.¹⁰³

Because of the very recent development of robust Chapter VI 1/2 peacekeeping operations, as well as their inherent complexities, the United Nations has yet to create consistent and workable rules regarding the use of force in such operations. Although it has formulated workable guidelines as to the use of force in self-defense in classical Chapter VI and 1/2 peacekeeping operations, there is little agreement as to how the laws of armed conflict apply during robust Chapter VI and 1/2 operations.¹⁰⁴

¹⁰³ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 324 (1993).

¹⁰⁴ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 *FORDHAM INT'L L.J.* 312, 320 (1995). Some say it is simply too difficult to apply the international law of armed conflict to United Nations peacekeeping operations. Instead, international humanitarian law should remain merely "relevant" to peacekeeping operations. "It is probably too complicated and not even necessary to try to incorporate the UN peace-keeping system into the negeal framework of international humanitarian law applicable in armed conflicts, but on a case by case basis special considerations might be given to the effect of that body of law on the proper functioning of the UN peace-keeping operations." TYGE LEHMANN, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 *NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM* 11, 17 (1985).

II C: United Nations Charter Chapter VII Peace- Enforcement Operations

The United Nations Charter Chapter VII is entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."¹⁰⁵ A Chapter VII peace-enforcement action is not a peacekeeping mission. Yet, just as the United Nations Charter does not mention peacekeeping, neither does it mention or contain the term "peace-enforcement." However, essentially any Chapter VII operation is one of creating and then maintaining peace. As the United Nations cannot be expected to mount a peacekeeping operation when there is no peace to be kept, Chapter VII envisages that the United Nations will, in certain circumstances, affirmatively enforce and make peace.

Peace-enforcement is distinct from peacekeeping as peace-enforcement usually will involve the use of force against a nation-state; whereas, classical peacekeeping limits the use of force to self-defense.¹⁰⁶ Yet, to date, the United Nations has never conducted, nor authorized, a "pure" peace-enforcement

¹⁰⁵ U.N. CHARTER arts 39-51.

¹⁰⁶ Judith G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J. INT'L L. 285, 290-91 (1996).

action. Rather, in the form of "neopeace-enforcement",¹⁰⁷ the United Nations has only "invited" or "requested" its member-states to take offensive military action on its behalf. Further, the United Nations to date has only authorized four such "neopeace-enforcement" operations.¹⁰⁸ Yet, it is Article 43 of the United Nations Charter¹⁰⁹ that was envisaged to be the primary instrument of the United Nations Security Council in peace-enforcement - a standing United Nations military force to be used to secure and maintain international peace. Most unfortunately, this force has yet to come into being.¹¹⁰

¹⁰⁷ Neopeace-enforcement refers to "the practice of the Security Council to contract out enforcement actions to Member States." Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 103 (1996).

¹⁰⁸ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 100-01 (1996). The four "neopeace-enforcement" actions were the authorization of member-states to repel North Korea's invasion of South Korea in 1950, the authorization to intercept oil tankers bound for Southern Rhodesia in 1966, and two authorizations for member-states to eject Iraq from Kuwait in 1990-91. *Id.* at 102, n. 41.

¹⁰⁹ U.N. CHARTER art 43 says:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

¹¹⁰ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 101 (1996). One noted international law expert has provided a pragmatic approach to achieve more effective peacekeeping and increase United Nations credibility. Burns H. Weston has recommended that member-states specially train military forces for peacekeeping duties and agree to place them on permanent standby in accordance with United Nations Charter Article 43. RICHARD A. FALK, ROBERT C.

As there are no military forces at the Security Council's direct disposal, its Military Staff Committee has no forces to direct in a "pure" peace-enforcement action. Instead, as stated earlier, the Security Council, occasionally has authorized member-states to conduct Chapter VII "neopeace-enforcement actions"¹¹¹ on behalf of the United Nations. The two most notable of these include the 1950 Korea neopeace-enforcement action and the 1991 neopeace-enforcement action against Iraq. In both cases, although it was the United Nations that authorized offensive military action, the operations were not under the command of the United Nations.¹¹² Further, in both cases, the forces authorized by the United Nations "were belligerent forces in an international armed conflict, and therefore, under existing international law, the personnel who

JOHANSEN, & SAMUEL S. KIM, *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* 362 (1993). Military equipment and supplies would be stockpiled and available for immediate use by peacekeeping forces activated on short notice. The United Nations would have much more flexibility to respond immediately with peacekeeping forces to crises as they fall. They would be available to be deployed into immediate action. If a regional crisis reached a certain established threshold, the United Nations would begin peacekeeping operations automatically, without consulting the Security Council. The peacekeeping forces could enter the territory of a country without first gaining that country's consent. United Nations peacekeeping operations would be directed toward securing an expeditious end to the conflict. However, more importantly, peacekeeping efforts would be directed toward the long-term stability of the region. *Id.* Such an arrangement would put the United Nations in the forefront of international peace and security.

¹¹¹ See Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 102-103 (1996).

¹¹² BOUTROS BOUTROS-GHALI, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING* 6 (3d ed. 1996).

served in these armed forces were lawful targets."¹¹³ For the purposes of this thesis, however, peace-enforcement actions refer to both "pure" peace-enforcement and "neopeace-enforcement" actions.

United Nations Charter Chapter VII provides the authority to "enforce" peace in the spirit of international collective defense. United Nations member-states, when authorized by the Security Council under Chapter VII, may take military action against an unlawfully expansionist military state or power.¹¹⁴ Chapter VII of the Charter envisages that the United Nations Security Council would "enforce" the peace initially through provisional measures such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."¹¹⁵ If these measures should prove to be inadequate, United Nations Charter Article 42¹¹⁶ authorizes the member-states to pursue collective military

¹¹³ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 102 (1996).

¹¹⁴ J.M. Sanderson, *Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention*, in PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY 145, 148 (Olara A. Otunno et al. eds., 1998).

¹¹⁵ U.N. CHARTER art. 41.

¹¹⁶ U.N. CHARTER art 42 says:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include

offensive operations against the offending state or states.¹¹⁷

The Security Council may "take such action by air, sea, or land forces as may be necessary to maintain or restore peace and security."¹¹⁸

II C1: The Cold War - The Korean War

During the Cold War, the United Nations Security Council authorized a Chapter VII peace-enforcement action to repel North Korea's invasion of South Korea. A unique set of circumstances led to this authorization. In 1950, to protest the United Nations seating the Chinese Nationalist Formosa government instead of the Chinese Communists at the Security Council, the Soviet Union recalled from the Council its permanent representative.¹¹⁹ On June 25th of that year, the North Koreans, supported by the Soviet Union, invaded South Korea. The United States called an emergency meeting of the Security Council. As a result of the fortuitous absence of the Soviet Union's representative and, concomitantly, the absence of the Soviet

demonstrations, blockade, or other operations by air, sea, or land forces of Members of the United Nations. (emphasis added).

¹¹⁷ J.M. Sanderson, *Dabbling in War: The Dilemma of the Use of Force in United Nations Intervention*, in *PEACEMAKING AND PEACEKEEPER FOR THE NEW CENTURY* 145, 148 (Olara A. Otunno et al. eds., 1998).

¹¹⁸ U.N. CHARTER art. 42.

¹¹⁹ BRIAN CROZIER ET. AL., *THIS WAR CALLED PEACE* 92, 93 (1984). The Soviet Union recalled its Security Council permanent representative from 10 January 1950

Union's permanent member veto authority, the Council was able to denounce the invasion, order North Korea to withdraw its forces from South Korea,¹²⁰ and "recommend" that member-states provide military forces to counter North Korea's invasion of South Korea.¹²¹

If the Soviet Union had been present at the Security Council, there is little doubt that they would have vetoed the United Nations peace-enforcement operation. Countries, if they acted at all, would have had to take action in their sovereign national capacity instead of under the authority of the United Nations.¹²² The absence of the Soviet Union permanent representative was an anomaly. It never happened again.¹²³ The Soviet Union permanent representative refused to miss future

to 1 August 1950. G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297, 300 n. 6 (1988).

¹²⁰ J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 15 (1999). The Soviet Union was fully informed that the Security Council was going to vote to condemn the invasion of North Korea. The Soviet Union responded, taking the position that any vote without their presence would be illegal. The Soviet Union miscalculated in believing their absence was, in effect, a veto of any Security Council action. Instead, the Security Council voted without them, condemning North Korea's invasion of the South and authorizing a United Nations force to repel it. Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

¹²¹ Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain,"* 7 DUKE J. COMP. INT'L L. 35, 44 (1996).

¹²² Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 14 (1985).

¹²³ G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 NETH. INT'L L.R. 297, 301 (1988).

meetings of the Security Council.¹²⁴ The Security Council was again at an impasse.¹²⁵ As a result, the United States turned to the United Nations General Assembly, which passed the famous "Uniting for Peace Resolution".¹²⁶ This resolution authorized continuing military action against North Korea until the conflict concluded. With the Uniting for Peace Resolution, the General Assembly assumed a cooperative role with the Security Council in international peace and security.

The Korean conflict was the only time that the United Nations has undertaken a peace-enforcement action in the name of the United Nations. The United Nations condemned North Korea, a nonmember, for its aggression against South Korea. Because the members of the United Nations had not created any military force as envisaged by United Nations Charter Article 43, the Security Council requested member-states to contribute military forces to

¹²⁴ J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 15 (1999). The Soviet Union permanent representative returned to the Security Council on July 27, 1950. The representative then made numerous unsuccessful attempts to unseat the Formoso Nationalist Chinese representative from the Security Council. The Soviet Union permanent representative attended every subsequent Security Council meeting regarding Korea, vetoing every subsequent resolution pertaining to the Korean conflict. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 67 (1993).

¹²⁵ A. B. FETHERSTON, *TOWARDS A THEORY OF UNITED NATIONS PEACEKEEPING* 27 (1994).

¹²⁶ The General Assembly made the following resolution:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security [the General Assembly] may make appropriate recommendations for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security.

be used in opposing North Korea's aggression. These forces were then organized and placed under the command of the United Nations. However, the United States provided the most forces and, most importantly, the command and control for this unified United Nations command.¹²⁷ Ultimately, the United Nations command and the United States command were, for all practical purposes, the same command. As a result, the United Nations had a very limited role in military operations throughout the Korean conflict.¹²⁸

On 27 July 1953, the parties to the conflict signed an armistice at Panmunjom.¹²⁹ The borders were reestablished to substantially what they were prior to North Korea's invasion. A demilitarized zone along the 38th parallel still separates the two countries.

U.N. Gen Ass. Off. Rec. 5th Sess. Supp. No. 20, 10 (A/1775) (1950).

¹²⁷ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 321-22 (1993). The United States contributed approximately 250,000 troops to Korean operations. Fifteen member-states contributed and additional 36,000 troops. TYGE LEHMANN, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 *NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM* 11, 14 (1985). United States killed in action numbered 33,629. Other contributing countries losses numbered 3195. The high losses to the contributing nations made the United Nations member-states very reluctant to again choose this method of peace-enforcement. G.C. BERKHOF, *Maintaining International Peace and Security: The Military Dimension*, 35 *NETH. INT'L L.R.* 297, 301 (1988).

¹²⁸ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 *NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM* 11, 14 (1985). See also, Bruce Russett & James S. Sutterlin, *The U.N. in a New World Order*, *FOREIGN AFF.*, Spring 1991, at 69, 73-74 ("the U.S. Commander of the U.N. Force in Korea never reported directly to the Security Council and the Military Staff Committee and the Security Council did not have any role in directing the military operations of the unified command.").

¹²⁹ G.C. Berkhof, *Maintaining International Peace and Security: The Military Dimension*, 35 *NETH. INT'L L.R.* 297, 301 (1988). An armistice is merely a "temporary suspension of hostilities by agreement between the opponents." (emphasis added). *WEBSTERS NINTH NEW COLLEGIATE DICTIONARY* 103 (9th ed. 1984).

Although the parties agreed to end active hostilities, it was merely the beginning of an unsettled peace. North Korea and South Korea are still technically in a state of war. The United Nations accepted victory in the form of a stalemate, a stalemate that still exists today.¹³⁰

II C2: Post-Cold War - The Persian Gulf War

Kuwait provided millions of barrels of oil on credit to Iraq during its 1980-88 conflict with Iran. When Kuwait would not forgive Iraq's extensive debt, Iraq became belligerent. Iraq accused Kuwait of "slant drilling" and taking disproportionate shares of a common oil field along the Iraq-Kuwait border. It made further accusations that Kuwait was exceeding oil quotas agreed to by the members of the Organization of Petroleum Exporting Countries (OPEC) and thereby was responsible for Iraq's fledgling economy. Finally, Iraq demanded that Kuwait relinquish its sovereignty of certain islands in the Persian Gulf. Even though Iraq had previously assured its Arabian neighbors that it would not resort to military force, on August 2nd, 1990, Iraq attacked Kuwait. Iraq crossed its southern border and invaded Kuwait with over 100,000 troops. Kuwait's

¹³⁰ Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations Emerging Role*, 45 NAVAL L. REV. 217, 238 (1998).

military was quickly routed. The Security Council, at the request and urging of the United States, met in an emergency meeting, condemned the invasion and demanded that Iraq immediately withdraw from Kuwait. This was the first of numerous Security Council actions leading up to Persian Gulf War.¹³¹

Military forces "invited" by the Security Council conducted the United Nations peace-enforcement action in Korea from 1950-53. In contrast, forces "authorized" by the Security Council conducted the United Nations peace-enforcement action in the Gulf War in 1991.¹³² Yet, the military action taken against Iraq also was not a "true" United Nations peace-enforcement action.¹³³ It was an action in collective self-defense. The Security Council first officially affirmed Kuwait had "the inherent right individual or collective self-defense, in response to an armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."¹³⁴ The Amir of Kuwait then requested the United States to assist Kuwait in collective self-defense to restore

¹³¹ L.C. Green, *The Gulf "War", the UN and the Law of Armed Conflict*, 28 ARCHIV DES VOLKERRECHTS 369, 373-74 (1991).

¹³² Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47, 49 n.s 4-5 (1994).

¹³³ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 322 (1993).

¹³⁴ S.C. Res. 661, U.N. SCOR, U.N. Doc. S/RES/661 (1990); 29 I.L.M. 1325 (1990).

the legitimate Kuwaiti government.¹³⁵ After this request, the Security Council authorized "member-States co-operating with Kuwait . . .to use all necessary means to uphold and implement" the resolutions.¹³⁶ The Security Council gave Iraq an ultimatum to withdraw from Kuwait by January 15th, 1991. After Iraq failed to do so, the Gulf War Coalition began massive air strikes and, approximately a month later, conducted a ground assault that overwhelmed Iraqi forces in only three days. The Coalition fully liberated Kuwait, ejecting all Iraqi forces, at the end of February 1991.¹³⁷

The action against Iraq was, ultimately, a United Nations authorized military action in "collective self-defense" in accordance with United Nations Charter Article 51, and not a

¹³⁵ The full text of the August 12th, 1990 letter from the Kuwaiti Amir to the President of the United States reads as follows:

Dear Mr. President,
I am writing to express the gratification of my government with the determined actions which the Government of the United States and other nations have taken and are undertaking at the request of the Government of Kuwait. It is essential that these efforts be carried forward and that the decisions of the United Nations Security Council be fully and promptly enforced. *I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self-defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented.* Further, as we have discussed, I request that the United States of America assume the role of coordinator of the international force that will carry out such steps.

With warmest regards,

Amir of the State of Kuwait

(emphasis added) (copy of letter on file with the author).

¹³⁶ S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990); 29 I.L.M. 1565 (1990).

"pure" peace-enforcement action.¹³⁸ Gulf War Coalition military forces remained under their own national contingents. The national contingents were organized and placed under the strategic command of United States General H. Norman Schwarzkopf. The Coalition forces did not wear United Nations insignia and were not bound to follow United Nations tactical instructions.¹³⁹

II D: Peacekeeping vs. Peace-Enforcement

The distinctions between peacekeeping missions authorized under United Nations Charter Chapter VI and peace-enforcement operations authorized under Chapter VII need to be clearly defined. Any use of force by a Chapter VI peacekeeper must be strictly construed as Chapter VI peacekeepers may only use armed force in self-defense. United Nations peace-enforcement operations, on the other hand, routinely involve the use of force, oftentimes actual combat, as a means of securing peace. The two operations, peacekeeping and peace-enforcement, are fundamentally different.

¹³⁷ HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 17-18 (1996).

¹³⁸ Article 51 of the United Nations Charter says in pertinent part: Nothing in the present Charter shall impair the inherent right or collective self-defence if an armed attack occurs against a Member of the United Nations . . ."
U.N. CHARTER art. 51.

Chapter VI peacekeeping operations should be specifically tailored to the situation or crisis and, generally, preclude offensive military operations. The rules of engagement regarding the use of force must be clear and peacekeeping soldiers must apply them equally to all parties to the conflict. In order to avoid losing credibility and to prevent escalating the conflict, Chapter VI peacekeeping soldiers must exercise great discretion in the use of force. If Chapter VI peacekeepers regularly use force, the mission becomes expanded to a *de facto* peace-enforcement mission for which the peacekeepers are not likely adequately prepared or equipped.¹⁴⁰

The distinction between peacekeeping and peace-enforcement is, currently, not nearly as clear as many believe or would wish. Peacekeeping operations are often animated and fluid. The Security Council can change a mission or mandate so that it begins to take on the character of a peace-enforcement action. Whenever a United Nations peacekeeping unit resorts to force, its neutrality and its obligations under international law may

¹³⁹ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 322-23 (1993).

¹⁴⁰ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 *FORDHAM INT'L L.J.* 312, 320-21 (1995).

be legitimately questioned.¹⁴¹ The operations on the ground are frequently fluid subject to rapid changes in intensity. As a highly experienced United Nations peacekeeper explains:

Once violence erupts the peacekeeper must often wait until the smoke of battle clears and the parties have agreed to take their first steps toward conflict resolution. In cases where the fighting does not stop and a decision is taken to intervene regardless, we are no longer talking about peacekeeping, but rather enforcement, intervention, or plain old war. Whatever we call it, we are in a totally different province from peacekeeping.¹⁴²

The commander on the ground, duty-bound to protect his force, must then ascertain what laws apply. The United Nations commander is given a mission and is duty-bound to carry it out. Yet, as the commander's responsibilities and mission implicitly change from peacekeeping toward peace-enforcement, so do the applicability or non-applicability of the laws of armed conflict. Unfortunately, the commander will not usually have a military lawyer immediately available to sort out whether or not the United Nations military force has become a party to the conflict and whether the laws of armed conflict then apply.¹⁴³

¹⁴¹ Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47, 48 (1994).

¹⁴² JAMES H. ALLEN, *PEACEKEEPING: OUTSPOKEN OBSERVATIONS BY A FIELD OFFICER* 39 (1996).

¹⁴³ Thomas B. Baines, *The Laws of War and the Rules of Peacekeeping Presented to The Joint Services Conference on Professional Ethics* 3-4 (last modified Jan. 31, 1997) <<http://www.usafa.af.mil/jscope/JSCOPE97/Baines97.htm>>.

This is why there should continue to be a clear distinction between peacekeeping and peace-enforcement operations. United Nations "[f]orces must not cross the impartiality divide from peacekeeping to peace enforcement. If perceived to be taking sides, the force loses its legitimacy and credibility as a trustworthy third party, thereby prejudicing its security."¹⁴⁴ Nevertheless, the distinction has of late been blurred as United Nations peacekeeping forces are given more robust operational contingencies causing peacekeeping missions to creep toward active peace-enforcement. This has the highly undesirable effects of eroding the credibility of the mission and endangering peacekeepers.¹⁴⁵ In the words of Secretary-General Boutros Boutros-Ghali:

The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.¹⁴⁶

Ultimately, the United Nations and its member-states do not have a clear policy regarding the use of force, except in the case of

¹⁴⁴ Max R. Berdal, *Fateful Encounter: The United States and UN Peacekeeping*, 36 SURVIVAL 1, 5-6 (1994).

¹⁴⁵ See *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fifteenth Anniversary of the United Nations, Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 50th Sess., para. 35, U.N. Doc. A/50/60, S/1995/1 (1995).

a classical peacekeeping operation in which peacekeepers are limited to the use of force in self-defense. Absent a cogent policy on the use of force in situations outside classical peacekeeping, a peacekeeping mission should not be allowed to become something it is not - a peace-enforcement mission. In other words, peacekeeping and peace-enforcement, in accord with their different mandates, must remain distinctly different missions. Peacekeeping should only be authorized under Chapter VI of the United Nations Charter and peace-enforcement operations should only be authorized under Chapter VII. If a classical peacekeeping mission begins to change and take on the character of a peace-enforcement operation, the United Nations should formally change the mission. It should withdraw its noncombatant peacekeepers, modify its previous mandate to a Chapter VII operation, and deploy a more appropriately trained and equipped combat force to accomplish the mission.¹⁴⁷

The decision to mount a Chapter VI peacekeeping mission results from political and military considerations that are quite different from those that would dictate a Chapter VII peace-enforcement action. Peacekeeping is intended to suspend a

¹⁴⁶ *Supplement to an Agenda for Peace: Report of the Secretary General*, 9 para.35, U.N. Doc.S/1995/1A/50/60 (1995).

¹⁴⁷ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 *FORDHAM INT'L L. J.* 312, 320-21 (1995).

conflict and allow the parties to pursue a long-term peaceful solution. A peace-enforcement action, on the other hand, is the use of military force to compel the desired result. The dynamics of the peacekeeping and peace-enforcement are entirely distinct from each other. If the clear distinction between these two separate United Nations security mechanisms becomes blurred, other ongoing peacekeeping missions can lose credibility and peacekeepers will be endangered. Peacekeeping, in which force may only be used in self-defense, and peace-enforcement, in which force is used to obtain a desired result, must be kept as separate and distinct alternatives. They should not be looked upon as points on a continuum - in which a peacekeeping mission would, if the military or political situation should change, simply change with it and expand into a peace-enforcement action.¹⁴⁸

If such a significant change in political or military circumstances occurs within a peacekeeping mission, the United Nations must re-evaluate its collective position. Should the

¹⁴⁸ BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE*, 15-16 (2d. ed. 1995); See also, Marrack Goulding, *The Evolution of United Nations Peace-Keeping*, 69 INT'L AFF. 451 (1993) ("Creating this kind of grey area between peace-keeping and peace-enforcement can give rise to considerable dangers. In political, legal and military terms, and in terms of survival of one's own troops, there is all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council." *Id.* at 461.

United Nations wish to continue its mission as one of peace-enforcement, the United Nations should then withdraw its peacekeeping forces. The United Nations should exclusively and expressly undertake peace-enforcement missions only under United Nations Charter Chapter VII. Then, nation member-states could contribute appropriately trained and equipped peace-enforcement military forces.

As a practical matter, however, these forces, authorized under Chapter VII, may have both peacekeeping and peace-enforcement duties. The forces should be given the appropriate resources to adequately perform the enforcement operation, and if necessary, escalate it. The peacekeeping forces should be given clear rules of engagement, tailored to the specific mission, as to when and in what circumstances armed force is to be used in order to avoid inappropriately escalating the conflict and undermining the United Nations intended end-state to the conflict.¹⁴⁹

¹⁴⁹ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 322 (1995).

II E: Protection of Peace-Keepers

- The Safety Convention

Over the past decade, the size and complexity of peacekeeping operations have greatly increased.¹⁵⁰ Concomitantly, the danger to peacekeeping personnel has also dramatically increased. Many countries have become reluctant to contribute troops to peacekeeping operations due to the dramatic increase in risks. In order to be able to better protect United Nations peacekeepers, the General Assembly has entertained several proposals by member-states. Ukraine, for example, proposed the United Nations create an international mobile peacekeeping force, specifically trained and equipped to be used to provide back-up assistance to peacekeepers should they come under prolonged attack. New Zealand advocated that United Nations peacekeepers should be designated internationally protected

¹⁵⁰ Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 121 (Helen Durham & Timothy L.H. McCormack eds., 1999). "Peacekeeping operations in the 1990s have seen the following activities being undertaken: military, including cease-fire monitoring, cantonment and demobilisation of troops, and ensuring security for elections; policing; human rights monitoring and enforcement; information dissemination; observation, organisation and conduct of elections; rehabilitation and reconstruction of State structures; repatriation and resettlement of large numbers of people; administration during transition of one regime to another; working with or overseeing the operations of regional or non-UN peacekeeping operations." *Id.* at 124, n. 7.

persons. As such, anyone who harmed them would be criminally prosecuted.¹⁵¹

Some within the United Nations Secretariat believed the problem of protecting peacekeepers was so serious that it was imperative that the United Nations act with a resolute response and policy. Others argued against the United Nations providing additional protections to its peacekeepers. These people were concerned that the United Nations would eventually have to negotiate with the same people who have been attacking the peacekeepers. In other words, these people argued, if the United Nations were to make these attackers war criminals, it would then be impossible for the United Nations to work with them after hostilities had ceased.¹⁵² Still others were concerned that if the United Nations enforced the protection of its peacekeepers through additional and possibly more destructive military action, the parties to the conflict may blame and then attack the peacekeepers for causing the additional action.¹⁵³

¹⁵¹ Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed. 1995); see also EVAN T. BLOOM, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 622 (1995). When finalized, the Safety Convention had drawn upon both the approaches of New Zealand and the Ukraine. *Id.*

¹⁵² Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed. 1995).

¹⁵³ See generally, Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed. 1995).

This is not to say that peacekeepers were not afforded any protections. For example, the 1980 United Nations Convention on the Prohibition or Restriction on the Use of Conventional Weapons expressly provided that peacekeepers receive information regarding the location of mines within an area of operations. Specifically, Article 8 of the Convention's second Protocol, requires that each party to the conflict must provide all available information regarding the number, types, and locations of mines and booby traps in the area to the United Nations peacekeeping force.¹⁵⁴ However, it was clear that much more had to be done.

¹⁵⁴ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 16-17 (1985). Article 8 says:

Protection of United Nations forces and missions from the effects of minefields, mines and boobytraps.

1. When the United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in the area, as far as it is able:
 - a) remove or render harmless all mines or booby-traps in that area;
 - b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
 - c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby-traps in that area.
2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission, except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or Have Indiscriminate Effects, art. 8, 1342 U.N.T.S. 137, 171 reprinted in 19 I.L.M. 1523, 1533 (1980).

In 1992, the United Nations General Assembly set up a committee for the express purpose of drafting a Convention to protect United Nations peacekeepers. Three years later, the General Assembly adopted the Convention on the Safety of United Nations and Associated Personnel.¹⁵⁵ This Convention criminalizes attacks on United Nations personnel engaged in peacekeeping operations. In no way does the Convention limit the right of United Nations personnel to defend themselves.¹⁵⁶

The Geneva Conventions do not address circumstances where the parties to a conflict attack United Nations peacekeepers and they respond in self-defense, but do not become "parties to the conflict."¹⁵⁷ However, should an attack on a classical peacekeeper escalate into an armed conflict, the peacekeeper will not lose protection under the Safety Convention. If a classical peacekeeper engages an attacker strictly in self-defense, regardless of whether "combat" has taken place, the

¹⁵⁵ Convention on the Safety of United Nations Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482, 492 (1995); See also, Judith G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J. INT'L L. 285, 287 n. 4 (1996).

¹⁵⁶ Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 630 (1995). Article 21 of the Convention says:

Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense.

Convention on the Safety of United Nations Personnel, G.A. Res. 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482, 492 (1995).

¹⁵⁷ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 189 (1995).

peacekeeper is still a noncombatant and not a "party to the conflict", and, therefore, not a lawful target. The attacker is a war criminal engaging in an unlawful attack on a noncombatant.¹⁵⁸

III: The Application of the International Laws of Armed Conflict to United Nations Forces - How and When do the Laws of Armed Conflict Apply?

III A: United Nations Classical Peacekeepers as Noncombatants

As just stated, classical United Nations peacekeeping forces are noncombatants. The laws of armed conflict generally do not apply to peacekeepers because they are not in a state of armed conflict with anyone. "[Traditional] UN peace-keeping operations by their very nature do not normally involve armed conflict."¹⁵⁹ As noncombatants, United Nations peacekeepers are protected as such under Protocol I, Art.37(1)(d). To designate themselves clearly as noncombatants to the parties of the conflict,

¹⁵⁸ See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 625-26 n. 12 (1995).

¹⁵⁹ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 150 (Shirley V. Scott & Anthony Bergin eds. 1997).

peacekeepers wear blue helmets and armbands. Only the United Nations may authorize the wearing of its emblems and symbols. It is unlawful for a non-peacekeeper to wear United Nations insignia to avoid being targeted. A party to the conflict that does so is guilty of perfidy¹⁶⁰ and may be punished accordingly.¹⁶¹ It follows that Protocol I envisages that United Nations peacekeeper personnel have protected standing. However, the Protocol does not define or explain the extent or attributes of this "protected status."¹⁶² It is clear, however, that Protocol I is meant to apply to classical peacekeeping missions and not to apply during peace-enforcement actions where United Nations forces are engaged as combatants.¹⁶³

¹⁶⁰ Perfidy is a violation of the international law of armed conflict. Perfidy involves a party to the conflict "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, art. 37(1), 1125 U.N.T.S. 3, 22, 16 I.L.M. 1391, 1409.

¹⁶¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, art. 37, 1125 U.N.T.S. 7; The Protocol prohibits "the feigning of protected status by the use of signs, emblems, or uniforms of the United Nations or of neutral or other states not parties to the conflict." Art. 37(1)(d), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409; See also L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 323-24 (1993). Further, Article 38 of Protocol I makes it unlawful to misuse the United Nations flag or emblem. Article 38 says: "[I]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, art. 38, 1125 U.N.T.S. 3, 22, 16 I.L.M. 1391, 1409.

¹⁶² Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 190 (1995).

However, the law of armed conflict may apply if the United Nations peacekeepers become a party to an armed conflict through the use of force for reasons other than self-defense. Should this happen, there are many resulting consequences. When the law of armed conflict applies, "captured force members would be entitled to prisoner of war status, forces actively engaged in hostilities would be lawful military targets, and enemies would be entitled to combatants' privilege."¹⁶⁴ Of primary importance, however, if United Nations peacekeepers are parties to the conflict and the law of armed conflict applies, is that the peacekeepers are no longer protected as noncombatants. As a result, the "participants in a conflict will target U.N. forces as enemies."¹⁶⁵

¹⁶³ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 190 n. 26 (1995).

¹⁶⁴ Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 110 (1997) See also, NATIONAL SECURITY LAW 359 (John Norton Moore et al. eds, 1990) (quoting Telford Taylor in explaining the combatant's privilege: "War consists largely of acts that would be criminal if performed in time of peace - killing, wounding, kidnapping, and destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over its warriors.").

¹⁶⁵ Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 111 (1997).

III B: The Laws of Armed Conflict as Applicable to Classical Peacekeeping Operations - The "Principles and Spirit" of the Law

Classical peacekeeping forces are part of and act under the authority of the United Nations. The United Nations as an organization is not bound by the Conventions relating to the laws of armed conflict, except in cases where the Conventions represent international customary law.¹⁶⁶ The international law of armed conflict, historically, has always been directed toward obligating parties to a conflict to conduct themselves in a manner that prevents unnecessary suffering. The laws of armed conflict refer to "belligerent parties", "parties to the conflict", "states", "enemy forces", "powers", "High Contracting Parties", and "signatories". A United Nations peacekeeping force, however, does not nicely fit into any of these categories.¹⁶⁷ The United Nations is not a signatory to the Geneva Conventions and therefore, many say the United Nations forces are not obligated to follow the terms of the Conventions. Regardless of this view, the Geneva Conventions capsule a

¹⁶⁶ REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 115 (Patricia S. Rambach et al eds., 1971).

¹⁶⁷ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 16 (1985).

great deal of customary international law that would then apply to all parties to an international armed conflict.¹⁶⁸ As noted by Daphna Shrager and Ralph Zacklin of ICRC:

[T]he argument that the United Nations cannot become a party to the Geneva Conventions because their final clauses preclude participation by the Organization, although still valid, is largely irrelevant to the question of applicability of these conventions to UN operations. The Geneva Conventions which have now been widely recognized as part of customary international law are binding upon all States, and therefore, also upon the United Nations, irrespective of any formal accession.¹⁶⁹

Although the ICRC had long maintained that all international humanitarian law applies to United Nations peacekeepers whenever they use force, the United Nations had officially taken the position that peacekeepers are obligated to follow only the "principles" and "spirit" of the international law of armed conflict.¹⁷⁰ For example, the instructions given to the 1957 United Nations Emergency Force (UNEF) in the Sinai stopped well short of naming the United Nations a party to the international

¹⁶⁸ Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 624 n. 11 (1995); See also Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 319 n.117 (1996), (Although much of the law of armed conflict is codified, the majority of its provisions would now be reflected in custom.").

¹⁶⁹ Daphna Shrager & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 39, 47 (Umesh Palwankar ed., 1994).

¹⁷⁰ Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW, 121, 127 (Helen Durham & Timothy L.H. McCormack eds., 1999).

law of armed conflict conventions. Instead of requiring United Nations forces to follow the Conventions, the Secretary-General directed that "[t]he force shall observe the *principles and spirit* of the general international conventions applicable to the conduct of military personnel."¹⁷¹

Similarly, the UNFICYP guidelines instructed the peacekeeping forces to respect the "principles and spirit" of international law regarding the conduct of military forces. Generally speaking, this meant that peacekeepers were not bound by all international law, such as the technical rules regarding the creation and operation of a prisoner of war camp. However, the peacekeeping forces, in keeping with the "principles and spirit" of the law of armed conflict were to conduct themselves in accordance with general principles of proportionality, chivalry, the prevention of unnecessary suffering, humanity, and martial honor. Additionally, the peacekeepers were to avoid military action that could potentially discredit the United Nations or negatively affect the legitimacy of the mission. For example, in keeping with these principles, the peacekeepers were to distinguish between civilian and military forces and between civilian and military objectives. The United Nations forces

¹⁷¹ REGULATIONS FOR THE UNITED NATIONS EMERGENCY FORCE OF 20 FEBRUARY 1957: APPLICABILITY INTERNATIONAL CONVENTIONS, OBSERVANCE OF CONVENTIONS, para. 44, *reprinted in* R.C.R.

could only use authorized weapons, prohibiting the use of weapons designed to cause unnecessary suffering.¹⁷²

In writing the general operational guidelines for the United Nations Force in Cyprus (UNFICYP), the United Nations Secretary-General explicitly authorized the use of force when protecting United Nations posts. Further, the Secretary General allowed UNFICYP to use armed force if a party attempted to gain unauthorized entrance to their posts, if peacekeeping forces were compelled to leave their posts, and if a party attempted to disarm them. Finally, the Secretary-General authorized peacekeepers to use force when required to stop a party from forcibly attempting to impede peacekeeping operations or attempting to prevent peacekeepers from fulfilling their responsibilities.¹⁷³

SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACE-KEEPING FORCES 168 (2d. ed. 1989) (emphasis added).

¹⁷² Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 16 (1985).

¹⁷³ Davis Brown, *The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norms*, 2 REVUE BELGE DE DROIT INT'L. 559, 571 (1994), citing *Aide-Memoire*, in N. concerning the function and operation of UNFICYP, U.N. SCOR, 19 Sess., Supp. For Apr.-Jun. 1964, at 13, U.N. Doc. S/5653 (1964). Also, during the United Nations peacekeeping mission in the Congo, the Security Council authorized the Operations des Nations Unies au Congo (ONUC) to engage in offensive action against the rebel forces in the Kantanga Province, if necessary to accomplish its mission. The Security Council broadly defined "self-defense" to include action taken in response to interference with the peacekeeping mission rather than limiting the use of force in self-defense only to action taken against peacekeepers. Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 16 (1985).

The United Nations, in not becoming a party to the Geneva Conventions, sought to ensure the peacekeeping operations, both in theory and in practice, were entirely distinct from peace-enforcement combat operations. Applying the law of armed conflict to peacekeeping operations could ultimately lead to tragic consequences. For example, one fundamental law of armed conflict, specifically the combatant's privilege,¹⁷⁴ allows a military member of one force to shoot and kill an enemy combatant virtually at any time.¹⁷⁵ If peacekeepers shot and killed hostile local inhabitants because of a misconception as to the application of laws of armed conflict to the peacekeeping operation, in addition to the actual tragedy, the entire operational mission would deteriorate. In short, it is unnecessary, dangerous and counterproductive to apply the laws of armed conflict to most peacekeeping operations.¹⁷⁶ For this reason, and others, the United Nations has been very reluctant

¹⁷⁴ Combatant's privilege entitles a combatant to kill or wound an enemy combatant without committing a crime. Further, "[a] lawful combatant possessing [the] privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war." Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 58-59 (1993).

¹⁷⁵ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 153 (Shirley V. Scott & Anthony Bergin eds. 1997). Of course, there are exceptions to the combatant's privilege, combatants who are *hors de combat* such as a soldier in the act of surrendering, a prisoner of war, or one who is wounded or sick. See, e.g., U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31, para 3-3 (a) (1976).

¹⁷⁶ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 153 (Shirley V. Scott & Anthony Bergin eds. 1997).

to endorse the application of the law of armed conflict to classical peacekeeping operations.

Even though the United Nations repeatedly declined to become a "party" to the Geneva Conventions, many called upon the United Nations to respect the Conventions and ensure United Nations forces complied with them.¹⁷⁷ In 1969, one commentator proposed the United Nations enact a resolution binding itself and its military forces to follow the Geneva Conventions of the United Nations.¹⁷⁸ In 1971, the Institute of International Law adopted a resolution entitled: The Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which

¹⁷⁷ For example, the 1954 Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, made this resolution: The Conference expresses the hope that the competent organs of the United Nations should decide, in the event of military action being taken in implementation of the Charter, to ensure application of the Convention by the armed forces taking part in such action.

Reprinted in R.C.R. SIEKMANN, BASIC DOCUMENTS ON UNITED NATIONS AND RELATED PEACE-KEEPING FORCES 78 (2d. ed. 1989).

¹⁷⁸ REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 111 (Patricia S. Rambach et al eds., 1971). Finn Seyersted of the Embassy of Norway proposed the following United Nations resolution:

[The . . . of the United Nations. . .]

1. Declares that, should any force of the United Nations become involved in any armed conflict, it will apply the provisions of the Geneva Conventions of August 12, 1949, and the Hague Convention of May 14, 1954.
2. Declares that the United Nations will require the States providing personnel to any United Nations force to take, in respect for such personnel, such penal and other action as is necessary for the enforcement of the said Conventions.
3. Declares that, when the Conventions refer to the law or the courts of the Detaining or the Occupying Power or to the conditions of treatment of its nationals, the law courts and conditions of one or more of the States providing personnel will be applied, if the Organisation has no applicable law, competent courts or relevant conditions of its own.
4. Requests the Secretary-General to transmit this resolution to the International Committee of the Red Cross and to U.N.E.S.C.O.

United Nations Forces may be Engaged. Article 2 of the resolution says:

The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces, which are engaged in hostilities.

The rules referred to in the preceding paragraph include in particular:

- (a) the rules pertaining to hostilities in general and especially those prohibiting the use or some uses of certain weapons, those concerning the means of injuring the other party, and those relating to the distinction between military and non-military objectives;
- (b) the rules contained in the Geneva Conventions of August 12 1949;
- (c) the rules which aim at protecting civilian persons and property.¹⁷⁹

The 1971 Convention resolution never attracted a following.

However, in 1991, the United Nations formulated its Model Participation Agreement to be used in peacekeeping operations. Before commencing a peacekeeping operation, the United Nations and Member-States contributing forces agree to the following:

[The United Nations peacekeeping operation] shall observe and respect *the principles and the spirit* of the general international conventions applicable to the conduct of military personnel. The international conventions referred

Id. at n. 23.

¹⁷⁹ Institute of International Law, *Resolutions Adopted and Recommendations Made by the Institute at its Wiesbaden Session, August 6-15, 1975, Conditions of Application of Rules, Other Than Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged*, 56-II ANNUAIRE DE L'INSTITUT DE DROIT INT'L 540 (1975), reprinted in D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICT* 903 (1989).

to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict. [The Participating State] shall therefore ensure that the members of its national contingent serving with [the United Nations peacekeeping operation] be fully acquainted with the *principles and spirit* of these Conventions.¹⁸⁰

The "principles and spirit" of international humanitarian law can be an illusive concept. Yet, the concept, has, for the most part, protected the noncombatant status of United Nations peacekeepers and has provided a framework for the appropriate conduct in peacekeeping operations. "Military personnel participating in peace-keeping operations may use armed force for self-defense and in accordance with their mandate to accomplish their mission. Under existing international law they are not lawful targets as long as they remain non-belligerents, even though they may be deployed in areas of ongoing hostilities."¹⁸¹

¹⁸⁰ *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations, Report of the Secretary-General, U.N. GAOR, 46th Sess., Annex, para. 28, U.N. Doc. A/46/185 (1991) (emphasis added).* Once a member-state contributes forces to a peacekeeping operation, the forces come under the Secretary-General who directs the forces through the United Nations Force Commander. The forces are under operational control of the United Nations, but concurrently serve under officers of their respective national contingents. Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 79-80 (1997).

¹⁸¹ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 134-35 (1996).

III C: Equal Application of the Laws of Armed Conflict

Since 1928, according to international law, war has been illegal.¹⁸² As a result, some have argued that an aggressor state should not be entitled to equal application of the law.¹⁸³ In other words, an aggressor-state and the state it unlawfully attacked should no more be on an equal legal footing than should a criminal be equal to the victim of a crime.¹⁸⁴ This theory of "unequal application", however, presumes that the existence of a legitimate means to determine the aggressor. The United Nations, for one, has not traditionally made decisions that name the aggressor and the subject of aggression to an armed conflict.¹⁸⁵ Further, neither the Hague nor the Geneva Conventions provide any basis for providing one party to the conflict more or less protection than another party.¹⁸⁶ Even more

¹⁸² THE KELLOGG-BRIAND PACT - GENERAL TREATY FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY 2 Bevans 732, 46 Stat. 2343, Treaty Series 796, 94 L.N.T.S. 57 (1928). From 1928 on, "war" has been prohibited between nations. According to the 1928 Paris Treaty, the use of force is now only authorized in self-defense or to punish unlawful aggression. The treaty essentially made war an international crime. REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 94 (Patricia S. Rambach et al eds., 1971).

¹⁸³ See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 112, 154 (1963); NATIONAL SECURITY LAW 85, 369-70 (John Norton Moore et al. eds., 1990).

¹⁸⁴ See REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 98 (Patricia S. Rambach et al eds., 1971).

¹⁸⁵ Judith G. Gardam, *Proportionality and Force in International Law*, 87 A. J. INT'L L. 391, 411-12 (1993). Excepting, of course, United Nations peace-enforcement actions.

¹⁸⁶ See REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 99 (Patricia S. Rambach et al eds., 1971).

specifically, Article 1 of all four Geneva Conventions clearly states the Conventions are applicable in "all circumstances"¹⁸⁷

Yet, regarding peacekeeping operations, it has been proffered that United Nations peacekeeping forces "are soldiers without enemies and therefore fundamentally different from belligerent forces."¹⁸⁸ If United Nations personnel were to be subject to the international law of armed conflict, this would place the United Nations, the global organization charged with maintaining international peace and security, on a plane equal to that of an aggressor nation-state whose use of force presumably violated international law.¹⁸⁹ However, the equality of the United Nations verses the nation-state waging an armed conflict of aggression is not at issue.

What is at issue is the equality of *military conduct* as between United Nations military personnel and the armed forces of the nation-state the United Nations opposes in a peace-enforcement action. The United Nations should be at the forefront of respecting and promoting respect among its member-states for the international law of armed conflict. The way to show such

¹⁸⁷ See REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 98 (Patricia S. Rambach et al eds., 1971).

¹⁸⁸ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 598 (Bruno Simma ed., 1994).

respect to the law, as well as to foster respect by its member-states, is to lead by example and adhere to the Conventions.¹⁹⁰

One might expect that the principles of international law, as followed by United Nations military forces, would also be followed by the belligerent parties taking action against the peacekeepers. For example, should a belligerent party detain United Nations peacekeeping forces, rules regarding prisoners-of-war could be applicable.¹⁹¹

Although, "[u]nder existing international law, non-belligerent forces acting under the authority of the Security Council remain unlawful targets until their use of force meets the de facto test of common Article 2 of the four Geneva Conventions of 1949, at which time they become belligerents and lawful targets",¹⁹² in light of more frequent and robust United Nations peace operations, one possible solution is to change the international law of armed conflict to give absolute protected status to all

¹⁸⁹ Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, VOL. I 3, 14 (Horst Fischer et al. eds, 1998).

¹⁹⁰ Toni Pfanner, *Application of International Humanitarian Law and military operations undertaken under the United Nations Charter*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 49, 58 (Umesh Palwankar ed., 1994); See also,); Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 105 (1997) ("[L]ess than strict adherence to the law of armed conflict by U.N. - authorized forces engaged in hostilities may actually encourage other parties to armed conflicts to disregard humanitarian law vis-à-vis U.N. forces.").

¹⁹¹ Tyge Lehmann, *Some Legal Aspects of the United Nations of Peace-Keeping Operations*, 54 NORDISK TIDSSKRIFT FOR INT'L RET OG JUS GENTIUM 11, 16 (1985).

"persons who serve the international community under the authority of the United Nations"¹⁹³ and make them "unlawful targets under all circumstances."¹⁹⁴ This argument loosely analogizes United Nations peacekeepers to police officers in a global domestic society. However, "[i]nternational society does not replicate the features of a national community and the United Nations does not at this stage command the degree of support and respect for its authority which is accorded to the organs of government within most national societies."¹⁹⁵

United Nations Peacekeepers are not global police officers and any push to develop them into some kind of global police force is, although not *utterly* utopian, most certainly approaching utopian. In reality, such a "protection" granted peacekeepers would serve to endanger them. It would "encourage an approach that one might as well be hanged for a sheep as a lamb."¹⁹⁶

Additionally, and perhaps more importantly, if United Nations forces were privileged with *superior* rights as to the use of

¹⁹² Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 137-38 (1996).

¹⁹³ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 164 (1996).

¹⁹⁴ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 164 (1996).

¹⁹⁵ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 204 (1995).

¹⁹⁶ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 206 (1995).

force in a peace-enforcement operation, the law of armed conflict could become much more difficult to enforce in other conflicts against other parties. If United Nations personnel were not accountable to the laws of armed conflict, the parties to the conflict could very well believe they also should not be held accountable.¹⁹⁷

The laws of armed conflict are based on the principle of equality of application. A state or party to a conflict follows the laws of war because the state anticipates the other party will reciprocate by following them, *non facio ne facias*. No examples exist where one state has bound itself to the laws of armed conflict without asserting and expecting reciprocity. Without equal application and reciprocity among both parties to a conflict, the laws of armed conflict could become meaningless.¹⁹⁸ As Sir Hersch Lauterpacht eloquently and succinctly explained: "[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules

¹⁹⁷ Connie Peck, *Summary of Colloquium on New Dimensions of Peacekeeping*, in *NEW DIMENSIONS OF PEACEKEEPING* 181, 190 (Daniel Warner ed. 1995). See HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UNITED NATIONS MILITARY OPERATIONS* 155-56 (1996) ("It could hardly be appropriate for forces acting under UN authority to be seen as licensed to practise barbarities greater than anything permissible for the parties already engaged in the situation which they are emplaced to terminate. In short, those who seek to act in the cause of lawfulness and humanity must surely themselves, in principle, be willing to be bound, at the minimum, by the basic humanitarian norms of the *jus in bello*.").

¹⁹⁸ See *REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS* 98 (Patricia S. Rambach et al eds., 1971).

of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."¹⁹⁹

Nevertheless, during the Korean Conflict, some believed that the United Nations need only comply with those *ad hoc* international laws of armed conflict it chooses. In 1952, the Committee on the Study of Legal Problems of the United Nations argued that the laws of armed conflict were not designed to apply to United Nations operations. It explained:

The Committee agrees that the use of force by the United Nations to restrain aggression is of a different nature from war-making of a state. The purposes for which the laws of war were instituted are not entirely the same as the purposes of regulating the use of force by the United Nations. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis*. In the present circumstances then, the proper answer would seem to be, for the time being, that the United Nations should not feel bound by the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes. We think it beyond doubt that the United Nations, representing practically all the nations of the earth, has the right to make such decisions.²⁰⁰

¹⁹⁹ Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953).

²⁰⁰ William J. Bivens, et. al., *Report of Committee on the Study of the Legal Problems of the United Nations, Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AM. SOC'Y INT'L L. PROC. 216, 220 (1952). Many have criticized Mr. Biven's proposal that the United Nations should be able to unilaterally select the international laws of armed conflict with which it wishes to comply. See, e.g. LORHAR KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 292-96 (1956); Roda Mushkat, *Jus in Bello, revisited*, 21 COMP. & INT'L L. J. S. AFR. 1, 17 (1988); US NAVAL WAR COLLEGE, 1966 INTERNATIONAL LAW STUDIES 24 (1966) cited in U.S. Dept. of the Air Force,

As a matter of practice, however, during both the Korean and the Persian Gulf conflicts, the peace-enforcement military forces authorized by the United Nations made every attempt to comply with the law of armed conflict. The peace-enforcement forces scrupulously complied with the applicable Conventions, despite continued blatant violations by both North Korea and Iraq.²⁰¹ Even though the Security Council may have determined that Iraq's invasion of Kuwait violated United Nations Charter Article 2(4), the Security Council never maintained that Iraq's illegal act relieved Coalition military forces from their obligation to follow the international law of armed conflict.²⁰² The Security Council did, however, rightly declare on numerous occasions that Iraq was legally bound to follow the international law of armed conflict.²⁰³

To foster reciprocal adherence to the international laws of armed conflict, the United Nations, when obligated to do so,

International Law - The Conduct of Armed Conflict and Air Operations, Air Force Pamphlet 110-31, 1-17 n. 47 ("If the United Nations picked and chose among the laws of war this would seem to be an invitation for the opposing belligerents to do the same. During the Korean War, as a matter of fact, the United Nations carefully observed the laws of war. This seems a more practical way of manifesting a superior legal and moral position").

²⁰¹ See L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 320-23 (1993).

²⁰² Judith G. Gardam, *Proportionality and Force in International Law*, 87 A. J. INT'L L. 391, 411 (1993).

²⁰³ See Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y. 335, 341-42 (1993).

must also follow them. As stated in the United States Department of the Air Force Commander's Handbook on the Law of Armed Conflict published by the Air Force Judge Advocate General:

The law of armed conflict applies equally to both sides in all international wars or armed conflicts. This is true even if one side is guilty of waging an illegal or aggressive war. The side that is acting in self-defense against illegal aggression does not, because of that fact, gain any right to violate the law of armed conflict. Even forces under the sanction of the United Nations as were United States forces in the Korean Conflict (1950-1953), are required to follow the law of armed conflict in dealing with the enemy. The military personnel of a nation may not be punished simply for fighting in an armed conflict. This is so even if the side they serve is clearly the aggressor and has been condemned for this by the United Nations. . . . Because, as a practical matter, all nations claim that their wars are wars of self-defense, the courts . . . [are] unwilling to punish officials for waging aggressive war if they are not at the policy-making level of government. . . . 'a private citizen [or soldier must not] be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or if it starts right, when it turns wrong.'²⁰⁴

The recent Convention on the Safety of United Nations and Associated Personnel,²⁰⁵ in light of the principle of equal application, recognized that there must be a clear distinction between the Safety Convention and the Geneva Conventions so United Nations personnel would be covered either by the Safety

²⁰⁴ U.S. Dept. of the Air Force, Air Force Pamphlet 110-34, para. 1-4 (b) (1-3) (1980).

Convention or the Geneva Convention. However, a United Nations military troop would not be covered by both Conventions. The Safety Convention drafters made this clear distinction in order to prevent eroding the Geneva Convention principle of equal application. The overriding concern was that, if the Safety Convention criminalized the use of force against United Nations forces engaged in a peace-enforcement action, the principle of equal application would no longer exist. The attacking forces would no longer feel bound to follow any laws of armed conflict.²⁰⁶ The principle of equal application is indispensable if the United Nations wishes, in time of armed conflict, similar treatment from the aggressor-state.²⁰⁷

²⁰⁵ Convention on the Safety of United Nations and Associated Personnel, G.A. Res 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482 (1995).

²⁰⁶ Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 625 (1995). The Safety Convention clearly delineated peacekeeping from peace-enforcement actions:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Convention on the Safety of United Nations and Associated Personnel, art. 2 (2), G.A. Res 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482, 486 (1995).

²⁰⁷ See generally U.S. Dept. of the Air Force, Air Force Pamphlet 110-34, para. 8-4 (a)(1) (1980) ("During the American Revolution, for example, the United States was able to obtain prisoner of war status for its troops in enemy hands only after threatening to deny such status to captured British personnel.").

III D: The Law of Armed Conflict as it applies to

Chapter VII Peace-Enforcement Operations

The Security Council traditionally will specifically state, within the resolution itself, whether the action they authorize is under United Nations Charter Chapter VII. However, determining whether a Security Council authorized action involves "peace-enforcement" can be problematic. Further, Security Council does not consistently use the term "enforcement" in its resolutions which authorize enforcement actions. As a result, one must look to the "object and purposes of the resolution."²⁰⁸

In both the Korean and Persian Gulf peace-enforcement actions, the law of armed conflict applied. In both conflicts, forces authorized by the United Nations adhered to the international rules and laws of armed conflict. In Korea, the United Nations Unified Command, after an initial reluctance, agreed that it would follow and enforce the law of armed conflict. This included the Geneva Conventions, even though the Conventions had not yet "entered into force" for any of the nations contributing

²⁰⁸ Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 625 (1995).

military forces to the Unified Command. Similarly, when the Security Council authorized its member-states to take military action against Iraq in 1990, the laws of armed conflict unquestionably applied. In fact, the Coalition frequently informed the world of its meticulous compliance with the law of armed conflict.²⁰⁹

It is well settled that United Nations military personnel who participate in peace-enforcement operations that breach the Common Article 2 threshold are combatants. Additionally, the 1994 Convention on the Safety of United Nations and Associated Personnel clearly envisages that United Nations personnel engaging in a Chapter VII peace-enforcement action are *combatants* and may be lawfully targeted by the opposing force.²¹⁰ Additionally, in his Bulletin regarding United Nations forces and international humanitarian law, General-Secretary Kofi A. Annan, also recently implied that United Nations forces, at

²⁰⁹ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 187-88 (1995).

²¹⁰ Article 2 says

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement Action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as *combatants* against organized armed forces and to which the law of international armed conflict applies. (*emphasis added*).

Convention on the Safety of United Nations and Associated Personnel, art. 2, G.A. Res 49/59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), reprinted in 34 I.L.M. 482, 486 (1995).

times, may be actively be engaged as "combatants."²¹¹

Conversely, the General-Secretary expressly recognized the *noncombatant* status of United Nations classical peacekeepers, as long as the peacekeepers do not become a "party to the conflict."²¹² The Secretary-General also envisaged that circumstances and peacekeeper actions may cause the loss of noncombatant status making the peacekeeping forces "parties to the conflict." In such a case, the international law of armed conflict would apply, in addition to the Secretary-General's Bulletin.²¹³

A United Nations peace-enforcement mission can and should be mandated only by Chapter VII of the United Nations Charter. All Chapter VII operations, however, do not necessarily equate to directives to engage an opposing force in an all-out war. Rather, troops that are carrying out a Security Council Chapter VII peace-enforcement mandate may very well find it desirable and appropriate to operate under some Chapter VI peacekeeping

²¹¹ See *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Sec. 1.1, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²¹² The General-Secretary said the "[B]ulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as *noncombatants* as long as they are entitled to the protection given to civilians under the international law of armed conflict." (emphasis added). *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Sec. 1.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

principles tailored to the specific mission. Yet, these United Nations peace-enforcement military personnel are combat troops given a combat mission. They must be in sufficient numbers and have proper armaments and clear rules of engagement. They must be given precise instructions as to what circumstances that they are authorized to use force. If force is ever used indiscriminately, a coercive but restrained peace-enforcement action could become full-scale combat. Such a development would escalate, rather than contain, the conflict and unfortunately defeat the purpose of the mission.²¹⁴ United Nations peace-enforcement military forces may very well further the mission, depending upon the intensity of the operation, by using sound discretion in the use of force and by making every attempt to foster the cooperation of the parties to the conflict, as do their classical peacekeeping counterparts.

III E: Can the United Nations be a Signatory to the Geneva Conventions?

The Geneva Conventions do not technically apply to United Nations peacekeeping forces that perform classical peacekeeping

²¹³ See *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Sec. 1.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

missions. First, the United Nations is not a nation-state. At present, only nation-states are parties to the Geneva Conventions.²¹⁵ The United Nations is not a signatory as Article 2 (3) of the Geneva Conventions explicitly only allows a nation-state to be a party to them.²¹⁶ Further, the Geneva Convention refers to "Powers." In the context of the Convention, "Powers" means nation-states and does not extend to insurgent groups or international organizations.

However, a number of commentators have postulated that since the United Nations has international personality²¹⁷ to enter into

²¹⁴ Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L. J. 312, 322 (1995).

²¹⁵ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 323 (1993).

²¹⁶ Article 2, para. 3 is common to all four Geneva Conventions. It says:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The United Nations Charter entered into force on June 25, 1945, four years before the adoption of the Geneva Conventions. Yet, the Geneva Conventions do not reference United Nations military action. This gap continues to this day.

²¹⁷ Case about Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174. With respect to whether the United Nations had authority to enter into treaties, the Court held, "[T]he attribution of international personality is indispensable. . . .the Organisation was intend to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on an international plane. It is at present the supreme

treaties and multi-national conventions, the United Nations has the capacity to enter into the Geneva Conventions provided the Conventions allowed it.²¹⁸ If the United Nations wished to accede to the Conventions, the parties to Conventions could simply consent to the accession by amending the accession clauses to the Conventions and allow it.²¹⁹ However, even this consent and amendment may not be necessary as the United Nations could potentially accede to all the Conventions under the First Protocol Additional to the 1949 Geneva Convention. This article allows a party other than a nation-state to affirmatively declare it will abide by the Geneva Conventions and subsequent protocols. Such a declaration then obligates the other parties to the conflict to the Protocol.²²⁰

type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, but entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. . . [The United Nations] is a subject of international law and capable of possessing international rights and duties . . ." *Id.* at 178-79.

²¹⁸ See, e.g., F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR, 344 (1961) ("[T]here can be no doubt that the United Nations has the inherent capacity to become a party to the conventions on warfare if their terms permit it to accede."), *Id.*

²¹⁹ See REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 106 (Patricia S. Rambach et al eds., 1971).

²²⁰ Article 96 says:

Treaty relations upon entry into force of this Protocol 1.

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph

However, it may not be desirable to have the United Nations become a party to the Conventions - at least in regards to peacekeeping. In peacekeeping operations, the United Nations forces are noncombatants, not combat forces. If the United Nations became a party to the Conventions, the parties to a conflict may look at peacekeepers differently - more aggressively as fellow combat troops.²²¹ United Nations peacekeeping "forces might appear as 'combatants'".²²² This possibility is not attractive.

Ultimately, the United Nations is unlikely to become a party to the Conventions. Acceding to the conventions could fatally

4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 12 1977, 1125 U.N.T.S. 3, 6, 16 I.L.M. 1391, 1399 (1977).

Regardless of the wording of Article 96, there is not a consensus as to whether the United Nations could become a party to the Conventions. As the International Committee for the Red Cross (ICRC) explains. "[n]or is it out of the question that the United Nations could be 'a party to the conflict' in the material sense, although the problem of accession of the United Nations to the Geneva Conventions and the Protocols remains a delicate question which has not yet been resolved." COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 507 (Y. Sandoz et. al. eds. 1987).

²²¹ REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 111 (Patricia S. Rambach et al eds., 1971).

wound classical peacekeeping operations. "[A] United Nations action, even if governed by the same laws as war in its traditional sense, *must be clearly distinguished from war*" and "accession by the United Nations to the conventions on warfare might blur the distinction."²²³

The United Nations has consistently maintained that it is not, nor shall it become, a party to the Conventions.²²⁴ However, this is not to say that the international law of armed conflict is not applicable to United Nations forces. Individual member-states that contribute forces to United Nations operations are bound. Further, the Geneva Conventions are now recognized as customary international law. The international law of armed conflict is therefore pertinent to United Nations peacekeeping operations. As commented by two renowned internationalists:

²²² Umesh Palwankar, *The Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, 294 INT'L REV. RED CROSS 227, 232 (1993).

²²³ F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 387 (1966).

²²⁴ See generally R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 185 (1968) (During peacekeeping operations in the Congo, the United Nations "refused to undertake the duty of compliance with the detailed provisions of the Conventions or to make any kind of official declaration by which it would engage itself to apply them in all circumstances"). Nevertheless, even though not a party to the Conventions, customary law applied and were "equally binding without the necessity for any accession to them by the United Nations." *Id.* at 180. In 1993, the United Nations in Somalia (UNISOM) peacekeeping force initially denied the International Committee of the Red Cross access to detained supporters of General Aidid. A United Nations officer allegedly told the media: "The United Nations is not a signatory to the Geneva Convention and its Protocols. Consequentially, the United Nations has no duty to respect international human rights law." Willy Lubin, *Towards the International Responsibility of the United Nations in Human Rights Violations During "Peace-Keeping" Operations: The Case of Somalia*, 52 INT'L COMM'N JURISTS 47, 54-55 (1994).

The United Nations itself is not a party to any international agreements on the laws of war. Moreover, these agreements do not expressly provide for the application of the laws of war to UN forces. However, it is widely held that the laws of war remain directly relevant to such forces.²²⁵

Even though a party to a conflict is not a signatory or party to the Geneva or Hague Conventions, the party is still bound to follow any customary international laws of armed conflict. Moreover, such parties to the conflict but not to the Conventions, in order to secure and maintain international credibility, usually will announce they will follow the principles of the Conventions. In the Korean War, neither the United Nations nor North Korea were parties to the Conventions. Nevertheless, both the Supreme Commander of the United Nations Forces and the North Korea Minister of Foreign Affairs stated their military forces would abide by the Conventions.²²⁶

²²⁵ DOCUMENTS ON THE LAWS OF WAR 371 (A. Roberts & R. Guelff eds., 2d. 1989).

²²⁶ L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 55 (1993). General Douglas MacArthur, United Nations Commander, said his forces would comply with principles of the international law of armed conflict, specifically dealing with prisoners of war:

My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly the common Article three. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly. I do not have the authority to accept, nor the means to assure the accomplishment of responsibilities incumbent on sovereign nations as contained in the detailed provisions of the other Geneva Conventions and hence I am unable to accredit the delegations to the UNC (United Nations Command) for the purposes outlined in those conventions. All categories of non-combatants in custody or under the control of military forces under my command, however,

The laws of armed conflict do not expressly refer to the United Nations, nor do the Conventions deal with the applicability of the laws of armed conflict to United Nations forces. However, when a United Nations force abandons its neutral peacekeeping role and becomes a party to the conflict, or engages in a peace-enforcement action as a party to the conflict, the United Nations is treated as a state. The laws of armed conflict then apply to the United Nations forces. The United Nations forces must follow the laws along with the forces that they oppose. In such cases, both the United Nations and the opposing forces are parties to the conflict required to treat each other as lawful combatants. Consequently, for example, captured forces of either side must be afforded all protections and rights provided under the 1949 Geneva Convention III.²²⁷

will continue to be accorded treatment prescribed by the humanitarian principles of the Geneva Conventions.
Cited in F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 184-85 (1966). Although the United Nations Command did not believe it was obligated to follow the Geneva Conventions because neither the United Nations nor Korea were parties to them, the United Nations Command adhered to most terms of the Conventions. Futher, "no state providing contingents maintained that the United Nations collective action was not governed by the general laws of war." FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 187 (1966). Both South and North Korea, on July 13th, 1950, said they were following the Geneva Conventions regarding prisoners of war and cooperating with the International Red Cross. N.Y. TIMES, July 5th, 1950, at 2.

²²⁷ Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP & INT'L L. 185, 189 (1995).

III F: Common Article 2 of the Geneva Conventions -

The Armed Conflict Threshold

Common Article 2 of the Geneva Conventions²²⁸ contemplates that the Conventions apply only during an international armed conflict. Common Article 2 is the threshold test for whether an international armed conflict exists causing the concomitant application of the international laws of armed conflict.²²⁹ A

²²⁸ Article 2, common to all 4 Geneva Conventions, says:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²²⁹ DOCUMENTS ON THE LAWS OF WAR 169-70 (Adam Roberts et. al. eds., 2d ed. 1989); According to Walter Sharp Sr, "[S]hort of an actual declaration of war or a case of occupation, military forces do not become a party to an international armed conflict until such time they become engaged in a use of force of a scope, duration, and intensity that would trigger the *jus in bello* with respect to these forces. This threshold is a factual, subjective determination that centers on the use of force between the members of the armed forces of two states. These factors are to be considered conjunctively, and in the context of the assigned mission of the forces. For example, military forces conducting a noncombatant evacuation operation do not become a party to an armed conflict when they use limited force to rescue personnel. Similarly, military forces do not become a party to an armed conflict when they use limited force to accomplish an assigned humanitarian relief or peace operation. In contrast, individual or collective military action in response to outright aggression, such as the

United Nations force that limits its use of force strictly to self-defense will not cross the Common Article 2 threshold.

However, a military force attacking a United Nations peacekeeping force, combined with the force used by the peacekeepers in self defense and subsequent offensive counter-attack, may reach the threshold of armed international conflict that invokes Common Article 2 and then results in the applicability of the law of armed conflict.²³⁰

However, what constitutes an "armed conflict" is difficult to define.²³¹ The International Committee for the Red Cross (ICRC),

coalition response to the Iraqi aggression that led to the Persian Gulf war, does cross the Common Article 2 threshold and the trigger the application of the *jus in bello*." Walter Gary Sharp, Sr, *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22-23 (1997) (unpublished manuscript on file with author).

²³⁰ See Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L 621, 625-26 n. 12 (1995); See also, Garth Cartledge (Director of International and Operational Law for the Australian Defense Force), *International Military Law*, "The Laws of Armed Conflict do not apply to UN or other peacekeeping forces because neither they nor the UN are in armed conflict with anyone. They are there, inter alia, to separate the parties, provide protection for the delivery of humanitarian aid and, hopefully, provide a more rational atmosphere or environment in which the factions may come to a peaceful solution. However, they do (and are legally entitled to) take self-protective actions involving the use of force from time to time. It goes without saying that if they cross the armed conflict threshold and enter into armed conflict then the Laws of Armed Conflict would apply." (emphasis added).
<<http://www.ozemail.com.au/~garthc/Index.html>>.

²³¹ Armed Conflict has been defined as a "conflict involving hostilities of a certain intensity between armed forces of opposing Parties . . . There are, of course, obvious cases. Nobody will probably doubt for a moment that the Second World War, or the Vietnam war, were armed conflicts, nor that the Paris students revolt of May 1968 did not qualify as such. For the less obvious cases, however, one will have to admit that thus far no exact, objective criterion has been found which would permit us to determine with mathematical precision that this or that situation does or does not amount to an armed conflict." FRITS KALSHOVEN, *THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT* 10-11 (1973); See also, *Prosecutor v. Tadic*,

interpreting the Geneva Convention, provided the following definition:

[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.²³²

The ICRC definition is purposely very broadly worded in order to include an entire spectrum of conflicts and bring them under the Conventions.²³³ Still, according to the ICRC, there is a

Case No. IT-94-AR72, 37 (App., Oct. 2, 1995) ("armed conflict" is when "there is resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within a State."); U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31, para 1-2 (b) (1976) ("armed conflict - conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements); However, see *id.* at para. 1-5 (c) ("[T]he international community has not regarded a few sporadic acts of violence, even between states, as indicating a state of armed conflict as existing."); Sylvie Junod, *Additional Protocol II: History & Scope*, 33 AM. U.L.REV 29, 30 (1983) ("[T]he concept of armed conflict is generally recognized as encompassing the idea of open, armed confrontation between relatively organized armed forces or armed groups."); and, see, 3 CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1991-88 (Marian Nash-Leich ed., 1989) ("Armed conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting. . . "). *Id.* at 3457.

²³² COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed., 1958).

²³³ See RICHARD I. MILLER, *THE LAW OF WAR* 275 (1975); See also, U.S. Dept. of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31, para. 1-5 (c) (1976) ("Generally, the international community has encouraged broad application of the law of armed conflict to as many situations as possible to protect victims of conflicts."); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW*, VOL. I 3, 6 (Horst Fischer et al. eds, 1998) ("While the term 'armed conflict'

prerequisite to the application of the international law of armed conflict - there must be "the presence of an armed conflict."²³⁴ One very practical definition is that an armed conflict exists when the Common Article 2 threshold is crossed. "That threshold is crossed when there is an identified enemy. There is an identified enemy when there are members of the enemy military or para-military forces belonging to another state committing acts of war in the apparent furtherance of that state's policy."²³⁵ The question of whether the threshold has been crossed is a question of fact, not of politics.²³⁶

Yet, the Common Article 2 *de facto* threshold is not a bright line test. Although the United Nations accepts that its

is not defined in any of the conventions, it has generally been given a very broad definition."); Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 121 (1996) ("[T]he threshold for the application of the Conventions was intended to afford maximum protection to belligerents and non-belligerents by ensuring the Conventions applied to as many interactions between the armed forces of states as possible.").

²³⁴ Toni Pfanner, *Application of International Humanitarian Law and Military Operations Undertaken Under the United Nations Charter*, in SYMPOSIUM ON HUMANITARIAN ACTION AND PEACEKEEPING OPERATIONS 49, 56 (Umesh Palwankar ed. 1994).

²³⁵ Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147, 154 (Shirley V. Scott & Anthony Bergin eds. 1997).

²³⁶ See Garth J. Cartledge, *International Humanitarian Law*, in INTERNATIONAL LAW AND AUSTRALIAN SECURITY 147 (Shirley V. Scott & Anthony Bergin eds. 1997) ("[W]hether or not there is armed conflict is a matter of fact, not a matter for declaration by some government or governing body. The application of laws of armed conflict is a matter which flows (and must flow) automatically upon the crossing of the threshold into armed conflict. The commencement of its application is not and cannot be retarded or denied because some person, body, body of persons or institution has decided or determined that laws of armed conflict are not to be applied. If its application was dependant upon the determination of such a body the question would become a political one which is quite clearly should not be.") *Id.* at 152.

traditional peacekeeping forces may theoretically become combatants, and hence lawful targets, when its peace operation reaches "*some undefined level of intensity*",²³⁷ the United Nations has so far declined to specify any potential circumstances that would result in its peacekeepers crossing the threshold. As a result, United Nations military forces currently do not have clear guidance as to what level of intensity crosses the Common Article 2 threshold amounting to armed conflict. Further complicating the problem, in some recent peacekeeping operations, peacekeepers in pursuing their mandated missions have more frequently and robustly used military force. This increase in the use of force has raised a great deal of concern about whether such force is in accordance with the law of armed conflict.²³⁸

The United Nations Operation in Somalia (UNOSOM), for example, shows the difficulties and controversies, inherent when attempting to determine whether a peacekeeping force has crossed the threshold into "armed conflict" and has therefore become a "party" to it. On October 3rd, 1993, the Unified Task Force (UNITAF) abandoned its previously impartial role and took military action against a specific Somali warlord, General

²³⁷ Walter Gary Sharp, Sr., *Protecting the Avatars of the International Peace and Security*, 7 DUKE J. COMP. INT'L L. 93, 150 (1996).

Aideed. When attempting to arrest him, intense fighting ensued. Eighteen U.S. soldiers and one Malaysian soldier were killed. Another seventy-eight U.S. soldiers, nine Malaysian soldiers, and three Pakistani soldiers were wounded. The United Nations Commission established to investigate the attack concluded that once the UNOSOM began taking action against General Aideed, they, arguably, crossed the threshold and were no longer "persons taking no active part in the hostilities" and hence became "parties to the conflict." As a result of this change of status, they were no longer protected under common Article 3 of the Geneva Conventions.²³⁹ Yet, the United Nations General-Secretary and the United States concluded the opposite: "It [is] the U.S. [and the] UN . . . opinion that their forces [did] not become combatants, despite carrying out some offensive-type operations (e.g. Task Force Ranger in Somalia)."²⁴⁰

To avoid having to deal with the factual uncertainty of whether some military operation has crossed the armed conflict threshold, the United States takes the position that it will

²³⁸ Judith G. Gardam, *Legal Restraints on Security Council Military Action*, 17 MICH. J. INT'L L. 285, 288-89 n. 10 (1996).

²³⁹ See *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them*, paras. 117-73, U.N. SCOR, 49th Sess., U.N. Doc S/1994/653 (1994).

²⁴⁰ UNITED STATES ARMY OPERATIONAL LAW HANDBOOK, 5-2 (LTC Manuel E. F. Supervielle et al. eds., 2000).

apply the international law of armed conflict to all operations.

The U.S. Army Operational Law Handbook says:

The [law of war] (LOW) applies to all cases of declared war or any other armed conflict which may arise between the U.S. and other nations, even if the state of war is not recognized by one of them. FM 27-10, para. 8. It also applies to cases of partial or total occupation. The threshold is codified in common article 2 of the Geneva Conventions. Armed conflicts such as the Falklands War, the Iran-Iraq War, and Desert Storm were clearly international armed conflicts to which the law applied. . . . In peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the LOW legally applies to those operations. The issue hinges on whether the peace operations undertake a combatant role. . . . Despite the legal inapplicability of the LOW to [operations such as Somalia and Bosnia], it is nonetheless, the position of the US, UN and NATO that their forces will apply the "principles and spirit" of the LOW in these operations. . . . In applying the [Department of Defense] policy, however, allowance must be made for the fact that during these operations U.S. Forces often do not have the resources to comply with the LOW to the letter. It has been U.S. practice to comply with the LOW to the extent "practicable and feasible."²⁴¹

In essence, the United States applies the principles and spirit of law of armed conflict to all conflicts, yet reserves that its forces will be bound by the law of armed conflict in cases only when it is clear that the Common Article 2 threshold has been crossed. This is a pragmatic resolution, to an issue of

²⁴¹ UNITED STATES ARMY OPERATIONAL LAW HANDBOOK, 5-2 (LTC Manuel E. F. Supervielle et al. eds., 2000); Accord HUMANTARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN - HANDBUCH. Aug. 1992, DSK AV207320065, para. 211: "Members of the German Army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts."

international law that is far from settled, and well serves United States interests. Yet, it does not provide an answer to the larger question - what level of combat intensity is required before United Nations peacekeepers cross the Common Article 2 threshold, lose their noncombatant status and become parties to the conflict, and may then be lawfully engaged as targets?

The answer may very well be that, specific only to United Nations peace operations and United Nations authorized peace operations, "the threshold for determining whether a force has become a party to an armed conflict [is] somewhat higher in the case of United Nations and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than [is] the normal case of conflicts between states."²⁴² This theoretically higher threshold, specific to United Nations peace operations, would bring international law in line with the United Nations' past practice and official policy regarding the peace operations in Haiti, Somalia and Bosnia. A formalized higher Common Article 2 threshold would allow the United Nations more flexibility and options during robust peacekeeping operations. Further, it would ensure United Nations personnel do not routinely lose their noncombatant status, and therefore

²⁴² Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, VOL. I 3, 24 (Horst Fischer et al. eds, 1998).

become lawful targets, when engaged in robust peacekeeping operations. Yet, even if the Common Article 2 threshold existed at a somewhat higher level than that applicable to nation-states, peace-keepers would still have ample incentives to restrain their peace operations in such a way to stay beneath it - namely peacekeeper protection, mission legitimacy, and the obvious desire to avoid unnecessarily escalating the conflict.

III G: The United Nations Answer - Half a Solution - A Code of Conduct for Peacekeepers

There have been numerous and resounding demands that the United Nations should promulgate clear directives regarding the applicability of the international law of armed conflict to United Nations personnel.²⁴³ In 1997, after decades of apparent apathy from the United Nations, the International Committee of the Red Cross (ICRC), announced it had been recently working with the United Nations to prepare a "Code of Conduct" for United Nations peacekeepers. Previously, in May 1996, the ICRC

²⁴³ See e.g., Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United Nations Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 182 (1999); Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 105-07 (1995); Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 115-117 (1997); HOWARD S. LEVIE, *WHEN BATTLE RAGES, HOW CAN LAW PROTECT?: WORKING PAPER*

and the United Nations had jointly prepared a proposed set of Directives for UN Forces Regarding Respect for International Humanitarian Law.²⁴⁴ The ICRC explained that its directives would clarify the "principles and spirit" of international humanitarian law to which the United Nations has implicitly bound its forces for the past fifty years.²⁴⁵

Finally, the United Nations had provided its long awaited official response, albeit a somewhat disappointing one. Secretary-General Kofi A. Annan, in his 6 August 1999 Bulletin, attempted to take a significant step towards clarification of the applicability of the international law of armed conflict in United Nations peace-keeping and peace-enforcement operations.²⁴⁶ Instead, he merely provided half a solution with a "one size fits all" code of conduct regarding all peace operations. He promulgated a directive that specified the very minimum standards of behavior expected of United Nations peace operations personnel. The Secretary-General entered the

PROCEEDINGS OF THE FOURTEENTH HAMMARSKJÖLD FORUM 64-65 (1971); International Military Law <<http://www.ozemail.com.au/~garthc/Index.html>>.

²⁴⁴ Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 121, 121 (Helen Durham & Timothy L.H. McCormack eds., 1999).

²⁴⁵ Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 121, 121 (Helen Durham & Timothy L.H. McCormack eds., 1999).

Bulletin into force on 12 August 1999, to coincide with the 50th anniversary of the adoption of the four Geneva Conventions.²⁴⁷

The Bulletin declared the "fundamental principles and rules of international humanitarian law" pertaining to United Nations peacekeepers.²⁴⁸

The Bulletin is "applicable to United Nations forces conducting operations under United Nations command and control."²⁴⁹ But, instead of clarifying how the international law of armed conflict applies during the different types of United Nations peacekeeping operations, the Bulletin simplistically says the principles apply "to United Nations forces when in situations of armed conflict they are actively engaged as combatants, to the extent and for the duration of their engagement. [The principles] are accordingly applicable in enforcement actions,

²⁴⁶ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, ST/SGB/1999/13 (1999)
<http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁴⁷ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, para. 10, ST/SGB/1999/13 (1999)
<http://www.un.org/peace/st_sgb_1999_13.pdf>; see also, *United Nations Calls for Renewed Efforts to Protect Civilians in War*, AFR. NEWS SERV., Aug. 13, 1999.

²⁴⁸ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, Purpose Stmt, ST/SGB/1999/13 (1999)
<http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁴⁹ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, Purpose Stmt, ST/SGB/1999/13 (1999)
<http://www.un.org/peace/st_sgb_1999_13.pdf>.

or in peace-keeping operations when the use of force is permitted in self-defense."²⁵⁰

In its desire to be simplistic, the Bulletin treats the use of force during a peace-enforcement action the same as the use of force in self-defense during a peacekeeping operation. Such a reduction fails to recognize that totally separate and different legal foundations authorize, as well as limit, the two forms of the uses of force - one being the laws of armed conflict and the other being an inherent right to defend oneself.²⁵¹ A better solution would have been to clearly define the three predominant peace operations - classical peacekeeping operations, robust peacekeeping operations, and peace-enforcement operations - and then promulgate different directives with separate rules for each. This would have helped keep the different operations distinct and reduced potential confusion.

Further, the Bulletin tends to concentrate on the use of force in accordance with the international law of armed conflict and does not clearly acknowledge that peacekeepers rarely use force

²⁵⁰ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, para. 1.1, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁵¹ See, Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 121, 121-22 (Helen Durham & Timothy L.H. McCormack eds., 1999).

in order to accomplish their mission. The use of force during classical peacekeeping operations is the exception - not the rule, and then only in self-defense. The use of force in peace-enforcement operations, on the other hand, is authorized if permitted under the rules of engagement and the specific United Nations mandate. By implicitly merging the concepts of peacekeeping and peace-enforcement and concentrating on the principles of the international customary law of armed conflict, the Bulletin risks that peacekeepers may view the two types of peace operations as the same. This could result in some peacekeepers believing, albeit erroneously and regardless of their rules of engagement, that the authorization for the use of force in both circumstances, is similar and possibly even the same.²⁵²

Moreover, the Bulletin is potentially under-inclusive because the Bulletin only applies to "United Nations forces." For example, the guidelines would not apply to military forces authorized by the United Nations, but under the control of regional military alliances. The guidelines would not apply, for example, to the NATO-led Stabilization Force (SFOR) in Bosnia-Herzegovina, forces in West Africa led by Nigeria, or the

²⁵² See, Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF*

NATO-led Kosovo Force (KFOR). These forces are authorized by the United Nations, but are not under its command and control.²⁵³ Such forces, of course, are bound by international customary law, as well as their own respective national laws.

Yet, the Secretary-General's Bulletin represents the first time the United Nations has officially recognized that United Nations forces are bound by the same principles that bind national troops. The guidelines were formulated over the past several years - the principles underlying the guidelines having been drawn from the Geneva Conventions.²⁵⁴ The Secretary-General

INTERNATIONAL HUMANITARIAN LAW, 121, 135-36 (Helen Durham & Timothy L.H. McCormack eds., 1999).

²⁵³ See generally J.D. Godwin, *NATO's Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV.1, 58-79 (1999); See also, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in all its Aspects: Statement by the International Committee of the Red Cross (ICRC)*, New York, 20 October 1999, <<http://www.icrc.org/icrceng.nsf/4dc39>> ("[T]he Bulletin applies only to UN forces conducting operations under the command and control of the United Nations. It does not apply to organizations authorized by the Security Council which are placed under the command of a state or regional organization. In such cases the States, or the groups of States concerned, must comply with the customary and treaty-based rules by which they are bound.").

²⁵⁴ See U.N. *Issues Guidelines for Peace Forces' Behaviour*, DEUTSCHE PRESS-AGENTUR, Aug. 10, 1999; See also, *Is International Humanitarian Law Applicable to Peace-Keeping and Peace-Enforcement Operations Carried Out by or Under the Auspices of the United Nations?* 1 May 1998, <<http://www.icrc.org/icrceng.nsf/813bf>> ("[T]he [International Committee for the Red Cross] has considered the question of the applicability of international humanitarian law to peace-keeping and peace-enforcement forces. It was felt essential to clarify this issue because troops of this kind are intervening with increasing frequency to situations of extreme violence in which they may have to resort to armed force. . . . For its part, the [United Nations] maintains that only the principles and spirit of [International Humanitarian Law] are applicable to these forces. Experts have formulated draft guidelines that spell out those 'principles' and the 'spirit' that the [United Nations] has undertaken to respect, within the framework of peacekeeping and peace-enforcement operations, whenever the use

promulgated the Bulletin, despite numerous objections from member-states. Secretary-General said that, "[t]he guidelines are not cast in stone, they will be revised in a few years time."²⁵⁵

The three page Bulletin succinctly captures generally uncontroversial customary international humanitarian law: United Nations military personnel may not attack "civilians or civilian objects."²⁵⁶ The United Nations personnel "shall respect the rules prohibiting or restricting weapons and methods of combat."²⁵⁷ Civilians will be "treated humanely"²⁵⁸ and women

of force is authorized for reasons of legitimate defence or pursuant to a specific mandate issued by the Security Council.").

²⁵⁵ See U.N. *Issues Guidelines for Peace Forces' Behaviour*, DEUTSCHE PRESS-AGENTUR, Aug. 10, 1999; Several member-states have indicated that they may be less inclined to participate in peacekeeping operations as a result of the issuance of the guidelines. However, the United Nations does not believe that the guidelines will cause any member state to either stop participating or reduce participation in United Nations peacekeeping operations. See Farhan Haq, *Rights: U.N. to Adhere to Geneva Conventions*, INT'L PRESS SERV., Aug. 10, 1999.

²⁵⁶ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 5.1, ST/SGB/1999/13 (1999)) <http://www.un.org/peace/st_sgb_1999_13.pdf>. Although the Bulletin is generally uncontroversial, capsuling customary international humanitarian law, it does contain at least one provision to which the United States would object. Paragraph 6-2 of the Bulletin says: "The use of certain conventional weapons, such as . . . anti-personnel mines, . . . is prohibited." *Id.* at para. 6.2. Thousands of personnel mines are deployed in the Republic of Korea (South Korea) along the Demilitarized Zone (DMZ) to deter an invasion from the North. Both the United States and South Korea take the position that if they were to remove the mines, it would effectively allow North Korea to invade South Korea. More importantly however, North Korea may misperceive the removal of the mines along the DMZ as a pre-cursor to South Korea preparing to invade the North.

²⁵⁷ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 6.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

and children are afforded special protections from attack.²⁵⁹ If the United Nations forces detain military personnel or civilians, the detained persons must be "treated in accordance with the relevant provisions of the Third Geneva Convention of 1949."²⁶⁰ Additionally, "[m]embers of the armed forces and other persons in the power of the United Nations who are wounded or sick shall be treated humanely and protected in all circumstances."²⁶¹

According to the Bulletin, if a United Nations military member violates these guidelines or other binding international humanitarian law, the member is "subject to prosecution in [the member's own] national courts."²⁶² However, this is voluntary on the part of the member-state. As one United Nations official explained, "'there is nothing in this bulletin that will compel

²⁵⁸ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 7.1, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁵⁹ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, paras. 7.3 & 7.4, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁶⁰ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 8, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁶¹ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 9.1, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁶² *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 5, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>; See also, D.W. BOWETT, UNITED NATIONS FORCES 504 (1964) ("[N]ational contingents in the service of the United Nations are bound to the same extent and degree, to all those rules of warfare which would obtain if the same forces were engaged in international armed conflict for the State alone.")

a member state to try its peacekeepers,' although he noted that all signatories to the Geneva Conventions are obliged to do so."²⁶³

The Secretary-General's Bulletin is a notable and positive step. It is, for the most part, uncontroversial in that it is brief and simply restates customary international humanitarian law. It is equally applicable in both peacekeeping and peace-enforcement operations.²⁶⁴ It does not "affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as noncombatants."²⁶⁵ Finally, the Bulletin expressly does not supercede the respective national laws of United Nations personnel, nor is it an "exhaustive list of principles and rules of international law binding upon military personnel."²⁶⁶ At present, it is little more than a minimum standard of legal behavior for United Nations forces.

²⁶³ Farhan Haq, *Rights: U.N. to Adhere to Geneva Conventions*, INT'L PRESS SERV., Aug. 10, 1999.

²⁶⁴ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 1.1, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁶⁵ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 1.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

²⁶⁶ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

However, this set of minimum standards of behavior is only half a solution. Unfortunately, while the Bulletin expressly recognizes that United Nations forces, under United Nations Command, may effectively be engaged as combatants, it does not specifically address the circumstances in which this may occur. The Secretary-General does not provide any guidelines as to when and how a noncombatant United Nations peacekeeper may become a combatant. The Secretary-General implies that a noncombatant peacekeeper may, in certain circumstances, lose the protection of the 1994 Safety Convention, but does not say what these circumstances entail.²⁶⁷

If United Nations peacekeepers are to be protected and maintain their protected noncombatant status, they must be provided clear guidelines as to appropriate rules of engagement. The United Nations must articulate a cogent definition of "armed conflict." With this definition, there must be an unambiguous threshold of when a United Nations military operation becomes an "armed conflict" in which United Nations personnel become combatants and lose protection of the 1994 Safety Convention. In such a case, the international law of armed conflict would apply and the United Nations personnel would become lawful targets. Due

²⁶⁷ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, para. 1.2, ST/SGB/1999/13 (1999) <http://www.un.org/peace/st_sgb_1999_13.pdf>.

to the gravity of such a scenario, it is imperative the United Nations clarify this gap in the international law of armed conflict.

IV: Conclusion

Classical peacekeeping customs and norms have developed over fifty years of operations. The characteristics of impartiality, consent of the parties, command and control of the United Nations force by the Secretary-General, and, most importantly, the use of force limited to circumstances involving self-defense have led to successful missions and the protection of peacekeepers.

However, as peacekeeping missions become more robust, missions have become ambiguous and peacekeepers endangered. To better the chances of mission success, ensure the mission is performed in accordance with international law, and to provide more protection to the peacekeepers themselves, the United Nations must clearly define the different forms of peace operations. The United Nations must lead a coherent and determined effort to keep peacekeeping missions distinct from peace-enforcement missions. Additionally, the United Nations must collectively strive to fill the recognized gaps in the international law of

armed conflict regarding its application to United Nations peace operations.

Just as "the failings of the United Nations are the failings of its member states," ²⁶⁸ so should the credit for the many successes of the United Nations be bestowed on its member-states. Ultimately, the lack of clarity in the international law of armed conflict regarding United Nations peace operations is a failing on the part of the member-states. To successfully fill this void, the member-states must seek consensus to clearly define the legal status of United Nations military personnel for each specific peace operation.²⁶⁹ The United Nations, at the behest of the member-states, should call an international convention to delineate the level and intensity of armed conflict that changes the status of a noncombatant peacekeeper to that of a combatant peace-enforcer. If United Nations peace operations are subject to a higher Common Article 2 armed conflict threshold, the United Nations should affirmatively and formally say so. A peacekeeper has a fundamental right to know what circumstances change the peacekeeper from a noncombatant to

²⁶⁸ DAVID HANNAY, 7 OXFORD INT'L REV. 4, 9 (1996).

²⁶⁹ See, Ralph Zacklin, *Managing Peacekeeping from a Legal Perspective*, in NEW DIMENSIONS OF PEACEKEEPING 159 (Daniel Warner, ed. 1995) ("Insistence on clarifying the nature of peacekeeping is not merely a lawyer's obsession with clarity and legal definition; it is necessary because the legal character and nature of the operation has a direct bearing on the legal issues which arise and their resolution."). *Id.*

a combatant, result in the loss of protection of the 1994 Safety Convention and, ultimately, make the peacekeeper a target that can be lawfully engaged.

These are momentous times. The United Nations may now come of age. Its envisaged role in 1945 can come to fruition if its member-states continue to collectively agree to practical and realistic methods of peacekeeping and peace-enforcement. The international community still, at times, struggles with the vision of international peace and security. It does not often act with one voice and, as a result, oftentimes fails to act at all.

Yet, despite the United Nations failings, it is the best hope for world security and the maintenance of peace. The post-Cold War world is one of uncertainty, but one of promise and optimism. It will remain so only as long as the member-states of the United Nations continue to "save succeeding generations from the scourge of war" and "unite our strength to maintain international peace and security".²⁷⁰

²⁷⁰U.N. CHARTER, preamble.